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THE UNANSWERED ARGUMENT AGAINST THE CONSTITUTIONALITY OF THE THE SO-CALLED COMSTOCK POSTAL LAWS,

AND FOR THE

Inviolability and Free and Equal Use

OF THE

UNITED STATES MAIL:

Containing Citations from the Ablest American Statesmen and Jurists,

BY

T. B. WAKEMAN,

Of the New York Bar.

TO WHICH IS ADDED THE OPINIONS OF DISTINGUISHED AUTHORS AND OTHERS WHO HAVE EXAMINED THE SUBJECT.

NEW YORK:
ISSUED BY THE NATIONAL DEFENSE ASSOCIATION
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93 Nassau Street,
JANUARY 26, 1880.

GENTLEMEN OF THE DEFENSE COMMITTEE:

You request a few words to introduce a reissue of my Faneuil Hall Speech for general circulation.

1. As to the style and tone of that speech, I wish it to be remembered that it was delivered to an *indignation* meeting in the warmest sense of the term; and that any expressions, apparently disrespectful to the Courts or Judges or "Powers that be," must be allowed for in the same way that much was 'pardoned to the Spirit of Liberty' in the Abolition and Republican reviews of the Dred Scott decision.

2. As to the substance of the argument I have never heard any answer to it, and I do not believe that any can be made. The Federal Government of the United States is one of powers specially granted and limited by the Constitution. The

claim that, because these powers are exercised through Departments, that, therefore, it can use these Departments (*e. g.* the United States Postal Department) for any ulterior, political, moral, or criminal purposes it may fancy, is simply to throw away the Constitution, and to give the General Government unlimited criminal and other jurisdiction, and, in the end, absolute power.

The second part of the argument is equally unanswerable, to wit, that this Legislation "*abridges the freedom of the press*," and, therefore, the liberty of the people. The Post Office is the necessity of every civilized person, and the principal means of publication. Every person has a free and equal right to its use, and to the right of publication by it without *prior* restraint, espionage, or forfeiture of his property. He is liable for the abuse of these rights just as he is liable for other abuses, but he cannot be *constitutionally* deprived of them before hand by a Postal Censorship established by Congress.

3. The importance of this subject is growing more apparent from day to day. Where the inch was usurped the ell is being taken. From supervision of "improper" matter, our Postal Censors have included Lotteries, and they are now busily engaged upon the correspondence of the Brokers of Wall street. The plea of necessity, and a little

public clamor to justify the extensions of this power, will place our "inviolable Post Office" on a par with that of Russia. What is done through this Department, can and will be done through the other Departments. The result will be inevitable. *The consolidated, centralized, general Government means the Empire!*

Let no one be deceived. In the end there can be no popular liberty unless the FEDERAL character of our Government is maintained. In Jefferson's words, we must cherish "the support of the State Governments in all their rights as the most competent administrators of our domestic concerns and the *surest bulwarks against anti-Republican tendencies.*"

At the same time he counsels the balance, viz.: "The preservation of the General Government, in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."

4. The only possible remedy now for the sacrifice and danger that these United States Postal Laws have brought upon us, is an appeal to the People and to Congress, until their true character and danger is understood. The Courts—rather accidentally than otherwise perhaps—have placed themselves in a position (as they did in regard to the United States Bank, the Legal-Tender, and Slavery generally,) in which no relief or safety

can be expected from them. They have made a precedent in the *Jackson case* that will ratify any claim that may be regarded as morally or otherwise desirable by the Departments.

Whether our Federal Government and our Liberties are to be preserved or not, is again a question resubmitted to the People and their Congress, and in no way more decidedly than by the patent usurpations of these United States Postal Laws.

Very respectfully yours,

T. B. WAKEMAN.

THE COMSTOCK POSTAL LAW UNCONSTITUTIONAL.

Plain Duty of all Citizens.

A SPEECH BY T. B. WAKEMAN.

To which is appended the opinion of Justice Field.

A LETTER TO THE OFFICERS OF THE THIRD LIBERAL LEAGUE IN THE CITY OF NEW YORK, IN RESPONSE TO AN INVITATION TO ADDRESS THEM.

Gentlemen: I feel greatly honored by the invitation to address your Liberal League upon the questions raised by the petition against the Comstock Postal Laws of 1873, which was so largely signed, and presented to Congress at the last session. But while I appreciate the importance of the subject, I find that a public address would be inconvenient; and I hope that you will accept my answers to your questions by this letter and the inclosed address at Faneuil Hall.

You refer to the petition as having been drawn by me, and "wish to know in what respect, if any, my views have changed in regard to it."

My answer is that the subsequent discussion, and particularly the decision of the Supreme Court in the Matter of Jackson, have changed my views only to increase the conviction that the ground taken in that petition is the only safe one, unless the people are willing to give up their constitutional guarantees of liberty of person and of the press. You probably inquire about a "change of views" because some have intimated that the petition was "hasty, ill considered, and ill advised." Let me assure you, on the contrary, that the petition was carefully considered and revised by several lawyers, publishers, artists, and others, Liberal and otherwise, before the responsibility, which was deeply felt, of sending it out for signatures was taken. Although Mr. D. M. Bennett's arrest was the occasion that called it forth, it was not his work nor that of any one person, but rather of a committee of consultation to whom the matter was by him entirely left. The whole subject was then so thoroughly examined that I do not hesitate to say that no law case nor important phase of the question has been since presented that was not before them. The only important facts that have since occurred have been the conviction and imprisonment of Mr. Heywood under the law, and the decision in the Matter of Jackson, in which the Supreme Court of the United States (by an *obiter dictum*) apparently sustained its constitutionality.

Another impression should be removed, which is to the effect that the petition was sent out simply as a Liberal party movement, designed to aid one

particular class of the people. It was intended to be above all partisan or sectarian spirit, purposes, or "traps." It aimed to combine a general public sentiment so as to carry out the motives of those great souls who made the Constitution "to secure the blessings of liberty to ourselves and our posterity." There is not a word in it that should prevent its being signed by any citizen, no matter of what belief or unbelief.

It is a matter of regret that this petition, and the most important matter it presents, has been left to the management of Liberals only, and even among them has been made a subject of editorial rancor and rivalry by those who have failed to rise to the height of the question involved. It is only to such persons that it appears as especially a Liberal movement or a Liberal "trap." This trap suggestion well illustrates the narrow-mindedness that is to be avoided in approaching questions of this character. We are told that if you dare to oppose these laws you will "fall into the trap" of allying yourselves and all Liberalism with "obscenity." But suppose you do not oppose them? Do you not then ally Liberalism with bigotry and fatal betrayal of liberty? Is not the latter "trap" the worse of the two? But why turn this into a trap question? It is not a choice between Scylla and Charybdis. Let us keep in mid-water and on the high sea, trust to pure motives and the breezes of liberty, and "traps" "to the right of us" and "to the left of us" may be safely left behind to catch those who set or think of them. The Liberal party or sect, like every other in a free republic, will find its justification and victory only in so far as it makes for the good and welfare

of the whole people. That liberty of the person, of speech, and of the press are the great means of effecting this welfare is the tradition that has come down to us associated with the names of Otis, Washington, Patrick Henry, Franklin, Jefferson, Madison, and Paine, and which it was the purpose of the petition to help to continue. The belief has been cherished that this tradition was embodied in the Constitution and its amendments, so as to make those liberties the fundamental law of the land. The question is whether these liberties can be "construed out" of the Constitution by Congress and the courts, while the people are blinded by appeals to their prejudices against Liberals or their disgust against obscenity.

In the true point of view, this is not a question of obscenity, but of liberty. The spirit in which it is to be approached is found in these memorable words of Madison:

"It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not delay until usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it."

But as to the attitude and importance of the questions involved, I think I could give no better answer than to send you a report of my address delivered at Faneuil Hall, Boston, on the 1st inst., at the great "Indignation Meeting" there held to consider the violation of the freedom of the press by the arrest,

trial, and sentence, under this law, of Ezra H. Heywood, the editor of *The Word*, now published at Cambridge, Mass. I send this address, instead of writing further, also because its main points were most heartily approved by the large and intelligent audience that filled the old Hall to overflowing; and this approval gives it a weight beyond my individual opinion. Very respectfully,

Your obedient servant, T. B. WAKEMAN.

August 8, 1878.

To COURTLANDT PALMER, Esq., President, and Other Officers of Third Liberal League, etc.

THE ADDRESS

AT THE INDIGNATION MEETING, HELD AT FANEUIL HALL, BOSTON, AUG. 1, 1878, TO REMONSTRATE AGAINST THE VIOLATION OF THE FREEDOM OF THE PRESS IN THE ARREST, TRIAL, AND CONVICTION OF EZRA H. HEYWOOD, EDITOR OF "THE WORD," AT BOSTON, MASS., ELIZUR WRIGHT, PRESIDENT.

Citizens of Massachusetts, and therefore by Birthright Friends of Liberty:

You have met *indignant* that one of your number, an editor against whom no man, woman, or child has ever complained of injury, who has not been unfaithful to the old Commonwealth or the Nation, has been imprisoned, as if a common felon, by the United States. You come under a sense of wrong, as your fathers did, to this old Cradle of Liberty, to ask why and how this wrong has come and to consult as to the relief and remedy.

The answer is that the wrong has come from a violation of the Constitution of the United States, and of that very liberty the blessings of which our fathers declared, in its Preamble, they intended to secure by it to themselves and their posterity. This violation has come indirectly and ostensibly for the very worthy purpose of suppressing obscenity. Let me say at the outset, that I respect the motives of the persons who have formed the Society for the Suppression of Vice, and who have contributed to sustain it, but they have selected an improper "Agent," and used means unlawful, unconstitutional, and unworthy of them. Your President has introduced me as the author of the petition so largely signed to have these laws in question repealed, and I wish, therefore, publicly to put my foot upon the libel that I, or others who have signed that petition, have so done as the abettors of obscenity or from a desire to give it aid and comfort. The question has become one of constitutional liberty and freedom of person, speech, and press, to which a few dirty pamphlets in the mails are as nothing. We are all agreed upon the question of obscenity—no one has a good word for that—but the issue is one of liberty, of constitutional liberty, and upon that we must take sides at once or it will be forever too late. People, however well intended, must not be allowed to imitate the bear who kept the flies off his master's head by smashing it with a stone. The imprisonment of an editor for anything he may print, except libel, is one of the most dangerous stretches of power possible in a free republic, and worthy of our gravest consideration. We must, therefore, under the Constitution, look closely into the means

and purposes with which this deed has been done. We shall find that the means are laws which have been passed by Congress; that by *obiter dictum* they have been sanctioned by the United States Supreme Court, and that in effect they take the very heart out of the Constitution.

When next we inquire as to the purposes, the "Agent" of the society which has procured these laws to be passed, informs us distinctly that it is "to stamp out the free press." His words, approved by the society, are these—I read from the last printed report of that society—"Another class of publications issued by Freelovers and Freethinkers is in a fair way of being stamped out. The public generally can scarcely be aware of the extent that blasphemy and filth commingled have found vent through these varied channels. Under a plausible pretense, men who raise a howl about 'free press, free speech,' etc., ruthlessly trample under foot the most sacred things, breaking down the altars of religion, bursting asunder the ties of home, and seeking to overthrow every social restraint."

This purpose, so plainly avowed, is well illustrated by the seal of the society on the cover of their "Report," in which an author or editor is pictured as a miserable convict being shoved into a prison cell, while the grand and virtuous "Agent" is making a bonfire of his books. Is not this a libel on our age and century? or have the Dark Ages returned? Certainly we have here a new Index and Inquisition. But if this avowal is not enough, here is a letter lately written to the *N. Y. Tribune*, in which the "Agent" informs us that "the work must go on." This letter is a perfect picture of illiterate

bigotry, and of itself proves that this "Agent" is the last person who should have been selected as the censor and inquisitor of our liberties and of the American press, if such an officer we must have.

The danger of this work by these means and purposes lies in their alleged goodness, in their being represented as "God's service," which we have only to recall the doings of Torquemada and Calvin to remember is too often but another name for man's woe, the more so, the greater the sincerity of the worshipers and the interest of their agents. That the majority are sincere as in the case of this society only increases the danger. In fact, in considering this and all social questions, we must ever bear in mind the three grand divisions of society:

1. There are the Retrogrades. Their ideal Eden, heaven, and hope for the race is to bring it back to some past state of society. They are mostly theological, and always praising the past times; "*laudatores temporis acti.*"

2. The Conservatives, who have great enjoyments or interests at stake, and wish therefore to preserve the present as long as they can, and then to go up and enjoy it all over again and forever in a heaven just above, but not much in advance of them.

3. The Liberals, who are generally poor or educated, or both, and therefore often very radical and progressive. Their heaven and ideal Paradise is in the future, for which they are always sacrificing themselves in the effort to make the present conform to it. This effort accordingly keeps them in con-

stant conflict with the other two grand divisions of society, who have generally been in a large majority, and whose self-preservation it has been, and is, to stamp them out, or keep them in a serviceable degree of humility.

Now, without recalling these divisions, we shall not fairly understand Mr. Comstock's society nor the Supreme Court, nor the Constitution itself. The Constitution is, in fact, the first grand and successful effort in government to harmonize these grand divisions. As such it deserves ever-increasing wonder and veneration as the only plan by which the great antagonistic classes of society are practically made to coöperate to the general good of the whole. The retrogrades and conservatives always combine and give stability to the national life, while the Liberals secure its progress and growth. The static and dynamic powers of society are thus each used and provided for. The conservative classes give a solid framework for order in the legislation and administration, and then the Bill of Rights provides guarantees for liberty of person, speech, and print, which will permit growth, and so renew the order, and prevent a despotism or a Chinese civilization. It was indeed a great triumph of statesmanship to consolidate the States into a Nation for general purposes, so that they and their people should preserve their safety and liberty only the more securely under the general shield of the Constitution; but it was a result that the most advanced philosophers and socialists may now wonder at, to find social order and progress practically reconciled. To find order resting upon liberty, which constantly renews and enlarges order, even when it seems to fall. In other

countries, as in France, for example, there has been little progress without revolution. The static element always seeks to "stamp out" the Liberals until social convulsions result, with all the outrages consequent upon repression. Do not think this is an idle dream or a glittering generality; the Constitution is its practical embodiment. By it the people and States join in establishing a government to administer certain special grants of power for specified objects, but all for the general purpose of making liberty the fundamental law of the land.

To illustrate, by coming to the very point in question, there is a grant among others, that Congress shall have power "to establish post-offices and post-roads," and then to this and all similar special grants there is one of the incidental powers "necessary and proper" to execute them. (Constitution, Art. 8, §§ 7, and 12.)

Now these are the only words in the Constitution on the subject of the post-office. It is admitted by all to be no general or sovereign grant, placing Congress in the position of the British Parliament. The only powers granted are such as are necessary, useful, or, as Chief-Justice Marshall said, "Appropriate to the end" of establishing, that is, of keeping in operation the post-offices and post-roads. One may well be lost in astonishment at the fertility of the construing faculty that can find in these simple words the power for the United States courts to sit upon the decency or the morality of Mr. Heywood's pamphlet, and to fine and imprison him, it might be for ten years, if it is found repugnant to the taste of the presiding judge. Ordinarily small fines of $20 to $100 (except for robbery or gross obstruction) are

found sufficient for postal purposes—just enough to remind people of the necessities of the service. The framers of the Constitution, and those who adopted it, were exceedingly and justly fearful of two things;—the granting of criminal jurisdiction to the general Government, and the use of these "incidental" or implied powers. Congress was not even allowed to define the crime of treason to the United States, and the special crimes they could punish were expressly named, as counterfeiting, felony on the high seas, etc.

For all post-office purposes these implied powers are easily ascertained and unobjectionable. But the point is, whether these implied powers can be used, not for any postal purpose, but as the authority for criminal statutes of the most terrible and yet indefinite nature, to effect what is supposed to be moral purposes. Can implied powers be used for purposes beyond the objects of the expressed power for which they were implied? Can implied powers become a source of original criminal jurisdiction outside of the ends for which they were implied as necessary? Can the part exceed the whole? The requirements or "convenience" of the postal department does not need nor require this extraordinary power. The post-offices and post-roads have been run for a century without thought that they needed such powers or protection. The exclusion of matter lessens the utility and income of the department, and in so far frustrates the object of the Constitution. Exclusion has therefore been made hitherto only on account of weight or injurious or dangerous character of the articles excluded, etc., on the grounds of the necessity or convenience of the service. This is

evidently the only true and constitutional ground. With the meaning of the documents inclosed the post-office has nothing to do, and if they have not, Congress has no authority to punish for sending them. The test of the implied power is, that it should be necessary or proper, *i. e.*, useful and "appropriate to the end," *i. e.*, required to effect the object for which it is implied, and where this necessity ceases the power ceases, for it has no ground to stand upon. An implied power can never be an ulterior power.

The case is well presented by Judge Story in his work on the Constitution in regard to the power to "establish post-roads." Could Congress under this clause construct through the States vast systems of roads, over which the mail could be run, and thus make it authority for unlimited internal improvements? The answer is plain: Congress cannot use this power as a pretext to construct internal improvements, or to effect any other ulterior purpose, but it may use it when, where, and however it may be necessary or proper for the object of postal communication.

The meaning of mailed matter has nothing to do with the post-office, nor that with the meaning. There is no necessity nor "convenience" of the service that is subserved by this penal law. Therefore it has no support in the grant of the Constitution, and it is a sheer, bold, monstrous pretext and usurpation.

It should be remembered that postal questions are far different in this country from what they are in England, where Parliament can do anything except, as it is said, make a man of a woman, or a woman of

a man; that is, physical impossibility is the only limit of Parliamentary power. There the power over the post-offices and people is comparatively unrestricted. But our general Government has only the special powers granted in the Eighth Article of the Constitution and such implied powers as "are necessary and proper to carry those special powers into effect."

The simple and single word to "establish" post-offices and post-roads was in no wise intended to grant to Congress the British ulterior power of using them after they were established for objects not committed to Congress at all, but specially reserved to the people of the States, by Amendments 9 and 10. That no such ulterior power was ever intended is clear from history. One of the greatest difficulties in procuring the adoption of the Constitution arose from the fear of these implied powers. Every clause was gone over and over in the Convention that framed the Constitution, and in the Conventions of the several States, to discover how these powers might be wrenched to destroy the liberties of the people. It is very significant that no one ever then supposed that this power "to establish post-offices and post-roads" could be other than such as should be simply devoted to that end. Luther Martin and Patrick Henry, who went over every word to find objections, saw none in this clause, and the authors of the *Federalist* (in No. 42) make their only reference to the subject in these few words: "The power of establishing post-roads must in every view be a *harmless power*, and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to

facilitate the intercourse between the States can be deemed unworthy of the public care." This plainly means that the postal power must be always, and in every way harmless, since it was only for the public "conveniency" of facilitating intercourse between the States. Little did those patriots dream that a hundred years thence a grant in every point of view so *harmless*, would grow by construction of an implied power into a terrible penal statute that has nothing to do with the "conveniency" of the post-office, or of the people, or with facilitating their intercourse, but which seeks to prevent and limit all these for the ulterior object of supervising morality. Had the possibility of this ulterior power been suspected then, the Constitution would never have been ratified. Let any one who doubts it turn over the pages of Elliot's debates on the Constitution (especially the Virginia convention), the *Federalist*, and the second volume of George Ticknor Curtis' "History of the Constitution."

Thus, from the words of the grant and their history, it is clear that no ulterior power of statute-making lurks in the "establishment" of post-offices and post-roads.

So this grant was understood and executed as "harmless" until 1836, when alleged attempts to circulate insurrectionary matter among the Southern slaves brought a message from President Jackson to Congress on the subject of excluding such matter from the mails. Mr. Calhoun was made Chairman of a special committee in the Senate, and the subject received careful consideration. He evidently wished for the power to exclude from, and to supervise the mails in the interest of slavery; but to his

great honor, be it said, he saw and declared plainly that the Constitution did not give Congress the power, and he would not claim it. The most he could ask was that by the "comity of nations" the United States would restrain postmasters from delivering such matter in the States which had made its circulation illegal. The question was discussed fully in a Senate of unequal ability, and even this limited restraint proposed by Mr. Calhoun was held by a vote of twenty-five to nineteen to be impossible under the Constitution. (*Con. Globe*, 1836, pp. 36, 150, 288, 237–9, etc.)

In the debate Henry Clay said: "When I saw that the exercise of a most extraordinary and dangerous power had been announced by the head of the post-office, and that it had been sustained by the President's message, I turned my attention to the subject and inquired whether it was necessary that the general Government should under any circumstances exercise such a power, and whether they possessed it. *After much reflection, I have come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatever.* The evil complained of was the circulation of papers having a certain tendency. The papers, unless circulated, and while in the post-office, could do no harm: *it is the circulation solely—the taking out of the mail and the use to be made of them—that constitutes the evil. Then it is perfectly competent to the State authorities to apply the remedy.* The instant that a prohibited paper is handed out, whether to a citizen or to a sojourner, he is subject to the laws which compel him either to surrender or burn it."

Mr. Clay then proceeded to demolish the claim that Congress could legislate to carry into effect the laws of twenty-four different States or sovereignties, and said ironically, "*I thought that the only authority of Congress to pass laws was in pursuance of the Constitution.*"

To the question of Senator Buchanan, of Pennsylvania, to the effect that the post-office power did give Congress the right to regulate what shall be carried in the mails, he replied in the negative, saying, "If such a doctrine prevailed, the Government may designate the persons, or parties, or classes who shall have the benefit of the mails, excluding all others."

During the debate, one of the safest of Senators, your own "Honest John" Davis, said:

"It would be claiming on the part of Government a monopoly—an exclusive right either to send such papers as it pleased or to deny the privilege of sending them through the mail. Once establish the precedent, and where will it lead to? *The Government may take it into its head to prohibit the transmission of political, religious, or even moral or philosophical publications, in which it might fancy there was something offensive; and under this reserved right, contended for in this report, it would be the duty of the Government to carry it into effect.*"

The debate and vote on this subject were conclusive. For even the modified right claimed by Mr. Calhoun few voted with him but his faithful friends of slavery from the South,—and James Buchanan; while with the majority were the great names of the Senate, including Benton, Clay, Crittenden, Davis, and—grandest of all, a name ever sacred in this Hall—Daniel Webster.

The debate was, as I have said, conclusive. Through all the dark night of the slave power, through all the dread necessities of the Rebellion, if the mails were ever violated, it was without the form or countenance of law. The post-office, in law and theory at least, and I believe generally in fact, has since remained the common and impartial servant and friend of all.

I have cited this debate, and may recur to it again, for two reasons. First, because if you look at the right, reason, and common sense of the matter, it is indeed conclusive; and, second, because by one of the most astonishing legal somersaults ever turned, the Supreme Court of the United States has made this very debate bring out the very opposite conclusion to which the Senators arrived.

If we inquire how this result has come, as in the case of most of our social evils, we must remember the consequences of our civil war. Under the war powers of the Constitution the Government had to use incidental and implied powers to effect constitutional but extraordinary ends; and so, through the revenue, excise, postal, income, and other laws, a system of supervision of the people was inaugurated, with a network of artificial crimes and penalties, as though the Government could do anything that seemed to it expedient. After the war the habits and precedents it induced have, to a great extent, remained. In no other way can the extraordinary mass of legislation that this "Agent's" society has obtained from Congress, and some of the State legislatures, be accounted for. These laws were, in effect, passed surreptitiously. The mass of the people never heard of them until they were being enforced. They there-

fore have no weight as deliberate laws of the Nation or the State. They are the private laws of the society which obtained them to be put upon the statute books without the knowledge of the rest of the community. In all cases affecting the people generally, the *referendum*, or at least public notice and discussion, is necessary to make the laws in any proper sense the acts of the people or the nation. In 1872 the society obtained from Congress an act that the tickets and circulars of *illegal* lotteries should be excluded from the mails under a fine of $100 to $500. When the power of the society was consolidated, in 1876, they had the word "illegal" stricken out of their statute, so as to exclude all lottery matter from the mails, whether legal in the States or not. Under this act A. Orlando Jackson was induced by a decoy letter of this "Agent," under the false name of J. Ketcham, to send him a lottery circular by mail. The agent thereupon had Jackson arrested, indicted, and tried at New York, in the U. S. District Court, for sending a lottery circular through the mail. He was found guilty, and was fined $100 and imprisoned until payment. To test the law, his very ingenious and able counsel, A. J. Dittenhoefer, Esq., of New York, had, before the trial (there being no appeal from the decision on the trial), applied upon petition for writs of habeas corpus and certiorari to inquire into his preliminary imprisonment. The petition was denied by the U. S. Circuit Court, and so the matter was brought before the Supreme Court of the United States.

Observe that the sole question, aside from the technical and very doubtful one as to the power to issue the writs at all, was as to the legality of these

postal lottery acts of 1872 and 1876. The ground taken by the petitioner's counsel was that Congress had no grant of power to pass the acts in question, and therefore they were unconstitutional and void. That was the sole and only question before the court; all beyond the decision of that question was *obiter dictum*. The briefs of the counsel on both sides of the case, which lie before me, present nothing further. The law of 1873, under which Mr. Heywood is imprisoned, was not before the court nor argued at all, nor was the effect of the amendments to the Constitution prohibiting Congress from passing any law abridging the freedom of speech or of the press, or forbidding the seizure of property without warrant, upon either of these laws, argued or presented to the court at all.

It was assumed by the court without argument, that lotteries and the "press" must share the same fate, as though lotteries were the press, and not business adventures, and not included at all under the amendment of the Constitution securing freedom of the press.

But let us now look for a few minutes at the main points in the decision of the court. Mr. Justice Field of California delivered the only opinion in which the court is supposed to concur. At the start he disposes of the main issue of the case, the only one actually presented and argued, by a singular assumption. It is this: Because the validity of legislation regulating what should be carried in the mails as to weight and form and postal charges, has never been questioned, and since such regulations have varied from time to time, therefore he infers, "The power possessed by Congress embraces the

regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." This begs the whole question ; for it assumes that matter has been excluded for non-postal reasons. Any argument from legislation and usage is at best of doubtful value, for time does not justify usurpation, but to be of any service whatever, it must be shown that the legislation and regulations have covered ends beyond and ulterior to the purposes and ways and means appropriate to the end of establishing post-offices and post-roads. The counsel for the petitioner claimed that for one hundred years,—from the foundation of the Government up to the lottery laws in question, there had been no legislation or regulations except such as were appropriate to the end, *i. e.*, to the running and utility of the Post-office Department, and that the attempt to go beyond this in 1836 was found to be unconstitutional in the debate we have referred to, and which he presented to the court. The learned Judge himself by the instances of "weight," "form," "postage," etc., really confirms this, for all such matters are plainly appropriate only to postal ends. But he argues because Congress has regulated as to these matters appropriate to the end, therefore it may do so generally, and as to matters that are not appropriate to the end ; that is to say, because Congress is authorized to include and has included certain articles that conduce to the utility of the service, therefore it may exclude others for reasons that have nothing to do with the service, but with certain supposed moral and religious ends. The conclusion should be exactly the reverse, for usage can

only prove the legality of acts and regulations in conformity with it, not of those opposed to it. The fact is that the unbroken and unquestioned usage proves, as far as usage can, the conclusion directly opposite to the one drawn by the learned Judge.

In order to sustain the conclusion he reaches, laws, decisions, and regulations, showing that from the adoption of the Constitution down, it had been the usage of the Government to go beyond the necessary and proper ways and means for running the postal department would have been in point; but no such laws or facts are pretended or found by court or counsel. From the opposite facts presented and even stated by the court, exactly the wrong conclusion has been drawn. The correct conclusion is that Congress has power to exclude for postal purposes and reasons and for no other. All other exercise of power of exclusion is a sheer usurpation.

The learned Judge having thus disposed of the counsel and his case in the way he should not, takes the whole case and more into his own hands. He does this because the wrong conclusion already reached by him brings him as he intimates into apparent, and as we think, into direct conflict with the Bill of Rights of the Constitution, known as the Ten Amendments. How, for instance, can this supposed power of Congress to exclude for non-postal purposes be reconciled with the clause, "Congress shall make no law . . . abridging the freedom of speech or of the press." Or, again, "the right of the people to be secure in their persons, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched and the person or things to be seized."

That the Constitution was never intended to give the ulterior powers claimed is evident enough from these and other clauses which are utterly inconsistent with them. The learned Judge, having by reversed logic found these powers in Congress, finds them to be useless unless he can enforce them consistently with the Bill of Rights, "and here" he truly says, "the difficulty attending the subject arises." But the same kind of logic is equal to the emergency, and in this way ;—he finds rightly that sealed letters and packets are prohibited from being opened and searched while in the mails ; also, that transportation and circulation of unsealed printed matter cannot be interfered with, for they are essential to the freedom of the press.

These are sound and healthy premises, and we expect the only logical conclusion, to wit, therefore, Congress can pass no laws excluding such matters from the mails except for postal reasons, because such laws would abridge the freedom of the press and be void.

But again the learned Judge has drawn exactly the wrong conclusion. He says, "If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

It is difficult to imagine a worse specimen of reasoning than this. The "*therefore*" works exactly the other way. Because transportation and circulation through the mails are, as he says, necessary to freedom of the press, *therefore* Congress cannot

abridge them or take them away. No other conclusion is possible.

But the learned Judge, to get around his own absurd conclusion, adds that if Congress does abridge and take them away, then it cannot forbid the transportation in any other way. This only makes the logic worse; it grants that the exclusion is an "abridgement" and then seeks to obviate that conclusion by saying that Congress must'nt take away its transportation as merchandise! That is, the press, before and since the adoption of the Constitution, has circulated its "letters, newspapers, and pamphlets" by means of two hands—one, the mail, the other, as freight; now says the learned Judge, Congress cannot pass any law abridging the freedom of the press, which is its circulation, but if it does and so cuts off one of its circulating hands, it must leave the other. As though cutting off this right hand was no abridgement! The correct conclusion is that Congress cannot cut off either of these hands. Certainly leaving one is no excuse for lopping off the other. Every attempt to make sense of this part of the opinion must be hopeless. Shakspere needed but a touch of this reasoning to finish the character of Dogberry, and crown his own genius as the poet of absurdity.

But one step in absurdity not only leads to another, but surely leads to unpleasant contrast with people who are not absurd. And so the learned Judge finds that his singular logic brings him into a position of direct opposition to the great jurists and statesmen who had settled the question the other way in the Senate in 1836. He brings all of these great men, however, apparently over to his side by

a legal somersault as absurd, false, and amusing as his former conclusions and logic. He says it is evident that the views of these great men "were founded upon the assumption" that Congress had not this power, *because* the postal grant to Congress is exclusive, and enables Congress to prohibit the transportation of newspapers and pamphlets over postal roads by any other way than by the mails. Now, he says, we will just turn back on the Senators and capture their ground by making this great court hold just the contrary of their assumption. "We don't think," he says, "that Congress possesses the power to prevent the transportation in other ways, *as merchandise*, of matter which it excludes from the mails." Now, first, this is absurdly irrelevant. The only question before the Senators was as to *postal* transportation, and that is the only one in hand now. Transportation "as merchandise" is entirely another affair. It belongs to commerce, which is under the control and regulation of Congress by another special grant. But in the next sentence the learned Judge grants the very ground of the Senators, to wit, that Congress has exclusive postal power, *i. e.*, power "to put down rival postal systems in the carrying of letters, newspapers, and pamphlets." If, therefore, Congress excludes such matter from the mails, except for postal reasons, it can and does take away the use of the post-offices for ulterior reasons, which is the very usurpation the Senators complained of; and also it abridges the freedom of the press, which it is expressly forbidden to do. How absurd to say Congress may do both of these things because it has not restricted commerce in freights. Mail matter is sent under the postal

laws "for intelligence;" freights are sent as merchandise for entirely different purposes. Newspapers, etc., "as merchandise," may affect the junk dealers, but have nothing to do with the freedom of the press. Congress cannot gain the right to exercise ungranted and prohibited powers under one clause of the Constitution by declining to exercise a power which it happens to have under another clause. It gains no power to pass Alien and Sedition laws because it refrains from suspending the writ of habeas corpus. Yet one of these is as much related to the other as commerce is to the postal grant and service.

The learned Judge does not say, but his argument, to be good for anything, implies, that the Senators denied the existence of this ulterior power *only* because they believed in this exclusive postal power and did not have the wit to make this "merchandise" discovery. We may safely grant they did not make it. They were not equal to its incoherence. It may be regretted that it was not mentioned, for it has the flavor of an Irish "bull," and would perhaps have relieved the bitterness of one of the first phases of the great slavery struggle.

But the position which the argument of the learned Judge thus assigns to the Senators is not, in fact, correct. They founded their conclusion against the power of Congress to exclude for non-postal purposes not only upon the exclusive character of the postal grant, but also, and chiefly, upon the grounds taken by every sensible man since, to wit, that the power is not included in any grant to Congress, and would also be a plain violation of the Bill of Rights. The argument from the exclusive power of Congress

was but one, and only a minor, argument, although good in their hands, as we have shown. The extracts already cited show that they took deeper and broader grounds; and extracts confirming it could be readily produced, from the same debate, to great length. Indeed, Mr. Calhoun himself finally said that the claim for this alleged power had been abandoned by the friends of the President.

Mr. Davis said, he "denied the right of the Government to exercise a power indirectly which it could not exercise directly; and if there was no direct power in the Constitution, he would like to know how they would get the power of the States—a legislative power at most."

Mr. Webster expressed himself as "shocked" at the unconstitutional character of the whole proceeding, he said: "Any law distinguishing what shall or shall not go into the mails, founded on the sentiments of the paper, and making the deputy postmaster a Judge, he should say was expressly unconstitutional."

He denied that there was any grant of such power, and Mr. Clay, as we have seen, was emphatic on this point. Any who doubt have but to read that debate in the *Congressional Globe* and Appendix of 1836 to find that the Senators took every ground except the absurd merchandise theory of this opinion.

But lastly, this assumption of the learned Judge is amusingly absurd in its practical results. He makes the Senators not to have known what they were about to little purpose. He would then have obtained power to exclude "the insurrectionary," as now "the demoralizing," matter from the mails by

merely prohibiting Congress from passing laws to prevent its being sent as merchandise by express, etc.—and thus it may be sent to any extent. Congress may throw out of the post-office such "objectionable" matter as it chooses on any whim or fancy, but then, he says, it cannot touch the same matter expressed as merchandise over the same postal route. But if the same matter can be carried by express, why limit the income and utility of the post-offices by throwing it out of them under such terrible penalties? Why should this simple difference between postal matter and merchandise subject the sender to ten years' imprisonment? Mr. Calhoun doubtless did not think of this stroke of statesmanship!

Having thus wonderfully ciphered out the power in Congress to pass these ulterior laws, his former absurdities bring the learned Judge to the practical difficulty that they cannot after all be enforced without manifestly violating the Bill of Rights. He undertakes therefore to devise and advise how it may be done—information of especial value to the "Agent" who had the laws passed, and receives half the fines. The two ways especially sanctioned by this learned Judge are, the post-office decoy system, and the post-office espionage system. Two plainer violations of the Bill of Rights, two meaner outrages upon liberty, decency, and morality, have never been perpetrated among our people. The learned Judge did not invent them. They are old instruments of the Christian Inquisition, but the "Agent" under these laws was the first to introduce them as modes of administration of our Constitution, and the learned Judge is the first in this country to throw over them the benignant smile of judicial approval. This he

does in a very smooth and graceful way. He admits that it would not do to examine, without warrant, into "letters and sealed packages" in the search for prohibited matter, but he says these regulations "may be enforcedupon competent evidence obtained in other ways, as from the parties *receiving* the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts." "And as to 'objectionable' printed matter, which is open to examination, the regulations may be enforced in a similar way, . . . and in some cases by the *direct action of the officers of the postal service.* In many instances those officers can act *upon their own inspection,* and from the nature of the case, must act without other proof, as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, *no difficulty arises, and no principle is violated, in excluding the prohibited articles or refusing to forward them.* The evidence respecting them is seen by every one and is in its nature conclusive."

The "Agent," who is also the special post-office agent of the Government under this law and decision, operates a decoy system in this way: He sends letters of apparent approval for any article, paper, circular, or advertisement, and when received by mail if he thinks it is "objectionable," although the letter or packet was sealed, he has his correspondent arrested and locked up, and if it is a lottery circular, or "offensive to the decency" of the United States District Judge before whom the "Agent" brings the case, he as judge of the law practically

orders a verdict of guilty, and may send the victim to prison for ten years, with a fine of $5,000, and there is no appeal whatever provided in such cases, and one-half of the fine goes to the Agent "who put up the job."

Or again, if you send any newspaper or printed matter, the case is worse, for in addition to the decoy system, this special agent, or any other "officer of the postal service," instead of being limited in his postal duty to seeing that the weight and postage is correct, and that it does not contain matter subject to letter postage, has also imposed upon him the moral duty of censor of the press, that is, he is, "upon his own inspection," to see that the printed matter is not objectionable, "as in case of obscene picture or print" or in cases of lottery circulars, etc., etc., and if he finds that it is "objectionable," then "no principle is violated" in his "excluding the prohibited articles, or refusing to forward them." But suppose you do not know or believe the matter you may have thus sent is "objectionable," and so you go innocently to inquire why it has not gone to its destination? Then the "Agent" is waiting for you, arrests you at once; there is no certainty that the delicate "decency" of a U. S. District Judge may not be offended; then you may go to prison for ten years, under a fine of $5,000, and the "Agent" is rewarded for his diligence by half the fine, and you have no appeal.

This is the kind of work that was done in the cases of Lant, Jackson, Heywood, and others I could name; and the "Agent" is waiting for your indignation to subside to push on "the work" of "stamp-

ing out" the free press under the approval of the highest court in the land!

If laws that have these results do not "abridge the freedom of speech and of the press" how can it be done? How "secure" you are in your letters, papers, and effects, when you entrust them to the "officers of the postal service" to find that they are stopped without warrant, or taken out as a decoy or trap to get you into States Prison by use of them as evidence, and to enable the informing agent to get half of any imposed fine! Under this decision the pretense of safety of papers and liberty of circulating are worse than vain. The very muniments of personal liberty are a snare and a delusion, for they are turned into instruments for its destruction. The story is that the garrison who surrendered to a Turkish Pasha were solemnly assured by him that not a drop of their blood should be shed. After the surrender he immediately ordered every one of them to be hung, and so kept his promise to the very letter. What morality is it that induces a Judge of the Supreme Court to keep the precious guarantees of the Bill of Rights in the same way?

Yet it is in the name of "public morals" that this result is reached. He concludes by the consoling assertion that "the object of Congress has not been to interfere with the freedom of the press, or with any other right, but to refuse mail facilities for the distribution of matter deemed 'injurious to the public morals.'" Then for the first time the hitherto undisclosed reason for going beyond the issue presented by counsel and the case—the motive for this long *obiter dictum*—appears; the learned Judge at last by force drags in the act of March 3, 1873, the

one under which Mr. Heywood was convicted, and renders it constitutional as far as his word can do it by way of illustration, without its being in issue before the court or the subject of argument. To do this he quotes the main section of the law of 1873, and then settles the whole matter in two sentences, which when we consider the importance of the consequences, fill us with astonishment. He says:

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people."

All the learned pretense of "reasons" is here swept away. It is at last plainly avowed and averred that Congress has the power to exclude, and to run the post-office for moral and ulterior grounds, and for and on those grounds only to punish with any penalty it may name, even of life, any attempt to send any thing or publication through the mail that it may "deem" or "suppose" to be "injurious to public morals" or of "demoralizing influence."

As our President said here to-night, if this is the law, the Constitutional Bill of Rights is not worth "two brass buttons," nor *one*. "All that Congress may mean" by any other act will be to exclude "libelous and seditious" publications, as under the Sedition Law, or "incendiary and insurrectionary" publications," as under Mr. Calhoun's law, or, as soon may be the case, all "revolutionary," "communistic," "socialistic," "destructive," "riotous," "blasphe-

mous," "irreligious," etc., etc., articles and publications, just as, in its unlimited power and wisdom, it may at any time ordain, with penalties of fine and imprisonment, or of life and death. And yet all this will have nothing to do with the freedom of the press or the liberties of the citizen! If you examine you will find that the First, Fourth, Fifth, Eighth, Ninth, and Tenth, which are the main Articles—the very substance — of the Constitutional Bill of Rights, are violated by these laws and this decision, and that if they are to stand, this Bill of Rights is not worth the paper upon which it is printed.

But not only is the Constitution and freedom of the press and people overthrown by these laws and this decision; the United States courts receive thereby an unconstitutional, dangerous, and most indefinite enlargement of their criminal jurisdiction. The case of Mr. Heywood ought to bring this danger home to you. Our fathers feared nothing more than this. The United States courts were regarded by them as, in fact, what they are—foreign tribunals to the mass of the people. The judges sit for life, without responsibility to the people; few lawyers know the practice; the juries are so selected that they are "packed" in effect if not by design. The districts are so large that even in the same State the accused rarely has a "jury of his peers or vicinage;" and, most surprising of all, in this criminal class of cases there is no appeal whatever! Think of one fallible man, under the most indefinite of laws, with the absolute power of fine and imprisonment, and even, in some cases, of life and death, in his hands, and no appeal! As those who were present at the trial and sentence of Mr. Heywood describe the out-

rage, it reminds me of one of Judge Jeffrey's trials, and illustrates well the dangers to which I refer. The Judge decided practically the law and fact; and when the jury hesitated, he wrung a verdict from them by a charge "in a roaring passion." Two judges sat and gave the victim "a double dose" because he had not promised to give up his constitutional right to send his pamphlet "as merchandise," and would not repent of having sent it at all—thus acting, not even as officers of this infamous law, but beyond it and as executioners and "confessors" of the new Inquisition. As Jefferson and Henry and Luther Martin said, 'The United States will be constantly gaining power by construction and the people constantly losing;—judge you in which way the balance will run. Where an inch is given an ell will be taken.' The lesson is that if you would not have Liberty leave you she must be guarded in her home among the States and people, and not be trusted out to United States judges and officials.

"But what," says the "Agent," like another "Statesman" of New York, who stole our money—a trivial matter to our liberties—"what are you going to do about it? I have the law and the courts, and the Supreme Court itself."

What we *do*, will depend upon what we *are*. If unworthy of our liberties, we shall lose them; if we rise to the height of the issue, we shall place them upon a firmer foundation than ever. Do not be appalled because the Supreme Court is against us; that may be the very condition of success. "Two things you can do when you are beaten," said a famous New York judge to a young lawyer; "one is to appeal; the other is to go down to the tavern

and abuse the judge." But in the Supreme Court we are told there is no appeal, and so Faneuil Hall has been kindly granted to us by your Common Council instead of the tavern.—Think a moment! is there no appeal? In all great cases in a republic, in all cases touching the rights and liberties of the people, who are the final judges of the law and the fact? Plainly the people themselves! The Supreme Court, being always retrograde and conservative, is almost sure to get on the wrong side whenever issues of liberty and progress are presented. They go for *the old* and *for power;* the people go for *the new* and *for liberty*, and in such cases they and *their* government have never failed to reverse the court. The decisions of the Supreme Court of the United States upon questions of popular rights and liberties are the Apocrypha of our constitutional law. The reversal of them has almost become a rule. Let me recall a few prominent cases none can forget.

John C. Calhoun said that up to his day "only one great constitutional question had been settled, to wit, the unconstitutionality of the Alien and Sedition laws, and that question had been settled 'against the Supreme Court.'" Judge Story sought to parry this thrust by showing that these laws were never really before the court. True; the Republicans knew enough to keep them out of that court, and thus to avoid an adverse decision; for decisions were, in fact, rendered in favor of those laws in every other Federal court.

Then came the question of the United States Bank. Andrew Jackson said, when the decision sustaining the constitutionality of the United States Bank came, "Now Marshall has made his decision,

let him enforce it." The people sustained "Old Hickory." The country was saved from the dominion of a moneyed aristocracy, and the court's decision took its place in the Apocrypha with the Sedition Law.

Then came the slavery agitation. If this question of "insurrectionary matter" in the mails had come before the Supreme Court then, there is little doubt but that it would have registered the will of the controlling slave power.

Of the constitutionality of the Fugitive Slave law and of all of its infamous details "the court had no doubt." *Then the Dred Scott decision*—who can forget?

Then the habeas corpus decisions against Lincoln and the war power of the Constitution; only by disregard of which decisions the Nation lives.

Then came the first legal-tender decision, when General Grant, who had saved us from the rebellion, lost all patience and had to save us from this court by taking off two judges bodily, and putting others there who could see that the war-contracts of the Nation were constitutional and had to be kept.

And now, at last, comes this Jackson-lottery-postal case—in many respects the most insidious and dangerous of them all.

What shall be done about it? The decisions of this court always, of course, settle the cases decided as to the litigants. It is settled, for instance, that Jackson had to pay his fine to get out of jail. But that is all—unless the people choose to let it settle more. The Supreme Court is a final *legal* tribunal in the cases before it, but not a final social, political, and, above all, not a theological, religious, or moral

tribunal. It settled that Dred Scott was a slave, but the people thereupon decided that every other Dred Scott should be free. That the post-offices are decoy traps and under the "moral" espionage of the officials is the sum of this decision. The people may demand that the post-offices must be free, equal, and safe to all; if we have the courage of the issue, they will so demand. Remember that every great and successful party in this country has had the adverse decision of the Supreme Court of the United States as its very corner-stone. Thus, the Republican party of Jefferson rested upon the Alien and Sedition Law decisions; and the only regret that lingers around the memory of your noble John Adams, whose bust stands behind me, is that he did not trust the people; that he assented to this law—for he never approved it.

Then the great Democratic party of Jackson was founded upon opposition to the abuse of implied powers, which culminated in the famous United States Bank decision.

Then the Republican party of Lincoln;—that was really founded by the adverse Fugitive Slave law and Dred Scott decisions of this very court.

Now we have the decision that may found another party. How far Liberalism is to become a political power in this country will depend upon the delay of Congress in repealing this law. I hope it may never become a political party at all. I dislike the thought of moral or religious political issues. Let all reasonable, moral, and persuasive means by petition and otherwise, be used first; but if that is unavailing, let every Congressman know that he has a new source of danger at the polls. The Liberal party is

young now, just beginning to see that it has a call to become organized for protective, social, and religious purposes. But, young as it is, it must meet this issue with a *decided protest*, a protest that will keep this infamous decision from ever becoming the 'law of the land' any more than those I have named. It is the only party that has the will or the courage to meet this question. The others will lie supinely by and be *bulldozed* out of their liberties by the cry of obscenity. The real growing end, the priceless new life of the nation and of the people, falls to its care and charge, and that too at a period of our country's history when nothing can be more dangerous than repression, when repression will be but another name for revolution.

The real Constitution of the country is this new life, *this liberty*, out of which the written Constitution grew, and a new and improved order is to grow. That liberty is the priceless treasure that Patrick Henry was so afraid to commit to a federal power that might become a federal tyrant. 'The spirit of liberty, and the maxims of liberty — they are the true Constitution of the American people,' he continued to repeat, with a wisdom that De Lolme and Mackintosh and more recent political philosophers have now more fully disclosed. "Constitutions grow, and are not made," they tell us. They are not dead pieces of parchment, but living organizations that enlarge with the people because they are the living skeletons of their life. They grow by constant construction. All great questions of liberty and government are with us, therefore, questions of constitutional construction, too great to be decided by any court. Every decision against the "Ameri-

can spirit" that Patrick Henry invoked has been overruled.

And now the deepest question of all is touched—the liberty that is the heart of the living social organism—the birthright secured to us in the Bill of Rights by Massachusetts and Patrick Henry and Jefferson, as the very condition of accepting the written Constitution at all, is to be stricken out. Will you submit to this? If you acquiesce, the Retrogrades and Conservatives will have full power and control of both Government and people henceforth. The only protection for the Liberal minority, who are the new growing and precious life, upon which, as in a plant, the whole progress of our national and social progress depends, will be gone forever. While, therefore, you have voice or vote, unceasingly let them be raised for the repeal of this law, in protest against this stupid decision, and in assurance that the people will acquiesce in it as 'the law of the land,' never, never, *never!*

But in our indignation let us not be unjust to the order that the written Constitution ordains and sustains. Liberty, progress, and order are all harmonious in a democratic republic, and must sustain each other. While we criticise with utmost freedom the decisions of our highest court, we shall not forget its necessity or its great services as a great legal tribunal. Let no one suppose that the opinion we have just reviewed is a specimen of its statesmanship or reasoning. That is not a legal, but a moral and religious decision; and under a "religious duress" who is responsible? Where the giant Superstition throws his shadow the powers of the mind are paralyzed and even reversed. Pascal was prostrate be-

fore the cross. "The mighty intellect of Newton" stood before the "Prophecies" like that of a rain-maker before his fetich. Thas tuch an opinion could have been "handed down" from the highest court in our land proves, as nothing else could, the necessity of a Liberal sect and party in America.

The trouble with these Judges and the "Society" they are sustaining is that they are conservatives, and also at heart Infidels. They have no faith in the integrity of the Universe, or the goodness of Man. The one is subject to miracles—the other to total depravity. The laws of the first may be set aside any moment by their God, and if man is not controlled by the "Agents" of the same God, if a free press and a free speech are really allowed, then those who enjoy them will "ruthlessly trample under foot the most sacred things, breaking down the altars of religion, bursting asunder the ties of home, and seeking to overthrow every social restraint." So it seems to them, and they have given us a decision from the fears of their hearts instead of from the clearness of their judicial heads. Mr. Justice Strong even wishes to put God into the Constitution The People are not enough for it to rest upon.

"Oh ye of little faith," the laws that mould "the lillies as they grow" prevail, too, through the human world. The religions, and the altars, and the ties, that need to be preserved by "restraints" of unconstitutional laws and decisions are condemned by that fact as "superstitions." The struggle you are opposing is really the effort of human nature to rise to a newer, purer, and truer social state—to a religion so consonant to human nature that it will be a duty and not a restraint—to an altar not red with

the blood of sacrifice, but loaded with the gifts of gratitude to Humanity for liberty and welfare achieved.

What is profanity and obscenity anyway but the corruption and disintegration of theology? It is only depraved theologians who misuse theological names, and turn purity into obscenity in word and deed. Liberty, knowledge, truth, and health will scatter both as the pure breeze clears the noisome air. To purify the fountain, do not break or obstruct it, but let the waters run fresh and clear.

Thus we find that this unconstitutional espionage-law is also impolitic and injurious to morals. Its repeal is justly called for upon both grounds in the petition referred to. A post-office regulation that all matter should be inclosed, and that postal cards should contain nothing that could be offensive to those to whom they are sent or to the public, is all that is necessary. This matter of the postal-cards is entirely in the power of the department as a necessary postal regulation. It is evidently inserted in the law in question only to give it the color of necessity. If it is thought best to retain the form of the law, it should be materially modified so as to be within the postal powers and purposes only.

This suggests the last point I shall touch, that is, public protection from actual obscenity. That is a matter reserved by the Constitution to "the People and the States," as Mr. Clay said as to incendiary matter, and they have only to do their duty. The price of purity, as of liberty, is eternal vigilance, and no law can remove the necessity of its exercise. The principal trouble is said to be with children and schools. The remedy is the power and the duty

which the common law gives to and imposes upon parents, guardians, and teachers, to see to it that they know what their children and wards read. A word to the postmaster to deliver printed matter sent to them to the legal guardian, so that he can distribute it, is all that is necessary. If tried, I do not think that much obscene matter will ever come. Instead of it will probably be found dime novels, sensational novels, and boys' and girls' newspapers, and Sunday-school trash—all as "corrupting," "demoralizing," and dangerous, in fact and effect, as any obscenity. As to grown people, and public decency, the matter will be taken care of, as now, by the State and municipal regulations. You have long-standing and sufficient laws on the whole subject in Massachusetts; and if Mr. Heywood had been found guilty under them, I should have left the matter to you, as her citizens. I should never have come here to enter a protest. But the case is far different when a citizen of New York comes here and arrests and convicts under a law of the United States and by their pretense of authority. Where he goes for such purposes, I felt it a duty, at no little sacrifice, to follow and protest. With what use and effect this protest has been made you must determine. The net of legal precedents woven for others will be woven for you. The birthright of American liberty, it is the tradition of this Hall that you will protect. The Past has made it your duty. If that birthright is sold or lost, for any object or upon any pretense, however moral or specious, *the fact is, it will be gone;* and when, Esau-like, you seek it, after many days in need, and even with "sorrowing and tears," you shall find it not!

TO FREEDOM.

O FREEDOM! Thou art not, as poets dream,
A fair young girl, with light and delicate limbs,
And wavy tresses gushing from the cap
With which the Roman master crowned his slave
When he took off the gyves. A bearded man,
Armed to the teeth, art thou; one mailed hand
Grasps the broad shield, and one the sword; thy brow,
Glorious in beauty though it be, is scarred
With tokens of old wars; thy massive limbs
Are strong with struggling. . . .
. . . . Tyranny himself,
Thy enemy, although of reverend look,
Hoary with many years, and far obeyed,
Is later born than thou; and as he meets
The grave defiance of thine elder eye,
The usurper trembles in his fastnesses.

Thou shalt wax stronger with the lapse of years,
But he shall fade into a feebler age—
Feebler, yet subtler. *He shall weave his snares,*
And spring them on thy careless steps, and clap
His withered hands, and from their ambush call
His hordes to fall upon thee. He shall send
Quaint maskers, wearing fair and gallant forms
To catch thy gaze, and, uttering graceful words,
To charm thy ear; *while his sly imps, by stealth,*
Twine round thee threads of steel, light thread on thread
That grow to fetters,—or bind down thy arms
With chains contained in chaplets. Oh, not yet
May'st thou unbrace thy corslet, nor lay by
Thy sword—not yet, O FREEDOM! close thy lids
In slumber; for thine enemy never sleeps,
And thou must watch and combat till the day
Of the new earth and heaven.

—*William Cullen Bryant.*

JUDGE FIELD'S OPINION IN THE JACKSON CASE.

SUPREME COURT OF THE UNITED STATES.

Number 6 (*original*).—*October Term*, 1877.

In the matter of A. Orlando Jackson. } On petition for writs of habeas corpus and certiorari.

1.—The power vested in Congress to establish "post-offices and post-roads" embraces the regulation of the entire postal system of the country. Under it Congress may designate what shall be carried in the mail, and what shall be excluded.

2.—In the enforcement of regulations excluding matter from the mail a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.

3.—Letters and sealed packages subject to letter postage in the mail can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

4.—Regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed

matter is excluded from the mail, its transportation in any other way cannot be forbidden by Congress.

5.—Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print.

6.—When a party is convicted of an offense, and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine is paid.

Mr. Justice FIELD delivered the opinion of the Court.

Section 3,894 of the Revised Statutes provides that "No letter or circular concerning [illegal] lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail;" and that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section, shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." By an act passed in July, 1876, the word "illegal" was stricken out of the section. Under the law as thus amended the petitioner was indicted, in the Circuit Court of the United States for the Southern District of New York, for knowingly and unlawfully depositing, on the 23 d of February, 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, inclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. The indictment sets forth the offense in separate counts so as to cover every form in which it could be stated under the act. Upon being arraigned the petitioner stood mute, refusing to plead, and thereupon a plea of not guilty was entered in his behalf by order of the court, (Rev. St., Sec. 1,032.) He was subsequently tried, convicted, and sentenced to pay a fine

of one hundred dollars, with the costs of the prosecution, and to be committed to the county jail until the fine and costs were paid. Upon his commitment, which followed, he presented to this court a petition alleging that he was imprisoned and restrained of his liberty by the marshal of the southern district of New York, under the conviction; that such conviction was illegal, and that the illegality consisted in this: that the court had no jurisdiction to punish him for the acts charged in the indictment; that the act under which the indictment was drawn was unconstitutional and void; and that the court exceeded its jurisdiction in committing him until the fine was paid. He therefore prayed for a writ of habeas corpus to be directed to the marshal to bring him before the court, and a writ of certiorari to be directed to the clerk of the circuit court to send up the record of his conviction, that this court might inquire into the cause and legality of his imprisonment. Accompanying the petition as exhibits were copies of the indictment and of the record of conviction. The court, instead of ordering that the writs be issued at once, entered a rule, the council of the petitioner consenting thereto, that cause be shown, on a day designated, why the writs should not issue as prayed, and that a copy of the rule be served on the Attorney-General of the United States, the marshal of the southern district of New York, and the clerk of the circuit court. The Attorney-General, for himself and others, answered the rule by averring that the petition and exhibits do not make out a case in which this court has jurisdiction to order the writs to issue, and that the petitioner is in lawful custody by virtue of the proceedings and sentence mentioned in the exhibits, and the commitment issued thereon.

The power vested in Congress "to establish post-offices and post-roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should

be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post-roads. At one time only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterwards books were added to the list, and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail. *The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.* The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. *Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.* No law in Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to exam-

ination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value. *If*, THEREFORE, *printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress.*

In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the Senate and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson, in his annual message of the previous year, had referred to the attempted circulation through the mail of inflammatory appeals, addressed to the passions of the slaves, in prints, and in various publications, tending to stimulate them to insurrection, and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of "incendiary publications" in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the states, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the states; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not the power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. "To understand," he said, "more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post-road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it,

shall carry letters.' The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties." Mr. Calhoun, at the same time, contended that when a state had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the states where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted.

Great reliance is placed by the petitioner upon these views, coming as they did, in many instances, from men alike distinguished as jurists and statesmen. *But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail;* and of course it would follow that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways as merchandise, of matter which it excludes from the mails. *To give efficiency to its regulations and prevent rival postal systems it may perhaps prohibit the carriage by others for hire over postal routes of articles which legitimately constitute mail matter* in the sense in which those terms were used when the Constitution was adopted—consisting of letters, and of newspapers and pamphlets when not sent as

merchandise—but further than this its power of prohibition cannot extend.

Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways, as from the parties receiving *the letters or packages*, or from agents depositing them in the post-office, or others cognizant of the facts. And as *to objectionable* printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts; and in some cases, by the direct action of the officers of the postal service. *In many instances those officers can act upon their own inspection*, and from the nature of the case must act without other proof, as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. *In such cases, no difficulty arises, and no principle is violated in excluding the prohibited articles or refusing to forward them.* The evidence respecting them is seen by every one and is in its nature conclusive.

In excluding various articles from the mail the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed *injurious to the public morals*. Thus, by the act of March 3, 1873, Congress declared "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, *or postal card upon which indecent or scurrilous epithets may be written or printed*, shall

be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned arti les or things, . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attemptod to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act, and of that we have no doubt.

The commitment of the petitioner to the county jail until his fine is paid was within the discretion of the court under the statute.

As there is an exemplified copy of the record of the petitioner's indictment and conviction accompanying the petition, the merits of his case have been considered at his request upon this application, and as we are of opinion that his imprisonment is legal, no object would be subserved by issuing the writs; they are, therefore, denied.

D. W. MIDDLETON,
C. S. C. U. S.

AN ANSWER TO THE INDEX CRITICISMS.

BY T. B. WAKEMAN.

The editor of *The Index* has honored my speech at Faneuil Hall against the Comstock Postal Laws with criticisms now extended to about eleven columns. This reminds me that "it never rains but it pours;" and if in all this quantity of words some things seem to escape me, let it be charitably remembered that I cannot reply to every sentence. But I will be careful to meet the material points. This I will do cheerfully, for these criticisms are the first and only public objections that hav been presented to the positions taken in that speech. Otherwise it has received a very general and decided approval from those who seem to me most competent to judge.

But let no one suppose that those positions are particularly mine. They belong to the mass of the Liberals, and, I believe, to the mass of the people, of this country. They were embodied in the petition against the Comstock Laws, signed by some 70,000 citizens. They were approved by the officers and audience of the Indignation Meeting before which the speech was delivered in Faneuil Hall; they were deliberately approved and incorporated into the Resolutions of the great Convention of Liberals of every shade of belief held at Watkins; they hav been generally approved by the Liberal press, and also by distinguished Liberals in many speeches and letters, and of which one from Mr. James Parton was published as a specimen in the last number of *The Index*.

The editor also does the Liberals too much honor if he represents the position as peculiar to them. It is simply that of the Constitution and of the people at large, and only as such hav I presented it.

He also lays out the *geography* of the discussion in too much of an individual manner, as though it was a kind of triangular contest between Messrs. Heywood and Tucker, and myself, and himself; whereas the real question is simply whether we shall insist upon the *free press* and *free post-office* which the Constitution provided for us, or not.

On this question, which is the only issue, the editor and his personal friends stand against the mass of the Liberals,

as I hav indicated, and will stand against the people of the country when their attention can be called to the issue.

Messrs. Heywood and Tucker do not differ from the Liberals of the country on this, the only issue before us. What the states may or ought to do about obscenity are questions as to the discretionary exercise of state powers. No question of that kind is now before the League or the Liberals of the country; and until the Liberals can get Mr. Heywood out of jail I do not propose to discuss with him how far or in what way the states should exercise a power which all must admit they possess. I do not believe in hitting a man who is down—not even Mr. Heywood. He is not to be held responsible for his opinions until he is a free man. As long as he is in prison, his extreme views as to the exercise of state powers are not to be wondered at, and are certainly excusable.

The question is, Shall the Comstock Postal Laws be repealed? The position of Congress and the people for one hundred years, *i. e.*, until the Comstock Postal Laws were passed, was stated and defended in the speech referred to. It was substantially as follows:

"(1) That the Constitution of the United States confers upon Congress no power whatever to legislate upon this subject; that its attempts so to do in the Comstock postal laws are beyond even any 'implied powers,' and are plain usurpations, which break down the whole Constitution as the bulwark of liberty, and, in the words of Hon. Elizur Wright, leave it 'not worth two brass buttons;' that those laws are in substance a decoy and espionage system over the post-office; that they have been the source of great wrongs and injustice; and that they cannot be amended so as to be safe and constitutional, and should therefore be repealed.

"(2) That the power to suppress obscenity and indecency, together with all other crimes or offenses, is one of the general powers reserved in the United States Constitution to the people and the states, and that it should be exercised by the state legislatures and courts with the greatest caution, only in 'unequivocal and well-defined cases,' and plainly within the constitutions of the several states."

The speech in question is a defense of these positions from a constitutional, political, and moral point of view, as against a *dictum* of the United States Supreme Court. As this speech has never appeared in *The Index*, I must remind all concerned that no adequate understanding of this discus-

sion can now be had without reading it, and the opinion of the United States Supreme Court annexed to it. I will cheerfully send both to any address, so as to do what I can to aid in the proper understanding of this subject. I offer to do this because I hav not time to answer the lengthy criticisms in detail, and because, after considering them carefully, it seems as though a careful reading of the speech itself would be the only answer to most of them really needed.

I say this not with any feeling of disrespect, but from the belief that if the editor had delayed forming an opinion until he "had thought out the subject in all its bearings," and had been free from unfortunate circumstances and controversies that, I fear, hav unconsciously influenced his judgment, he would hav stood bravely with us.

This view is confirmed by the nature of his objections, which, let me say once more, seem to involve no real difference of principle, but only (1) *confusions* and (2) *misapprehensions*, which he unfortunately seems to desire to magnify, as if in self-defense.

The discussion, so far as it has gone, has certainly developed important agreements, which I did not anticipate from the defiant manner in which the editor opened it. Let me call attention to these agreements, as the common ground between us from which we may hope to conquer the remaining differences.

I. The editor is entirely with us on the most important part of the subject—one that seems to me to involve in substance the whole. He agrees that the present Comstock Laws *are unconstitutional;* that they abridge the freedom of the press; and, therefore, that the Supreme Court is all wrong on this subject. He says:

"We entirely agree with Mr. Wakeman that the Comstock laws, *as they hav been administered*—nay, more, as they can scarcely fail to be administered, so long as they retain their present dangerous vagueness and indefiniteness—*flagrantly violate* the freedom of the press, and are *certainly* for that reason *unconstitutional*. His argument is powerful and *unanswerable*, so far as it relates to these laws in their present form."

The best thing to do with unconstitutional laws is to repeal them; that is the general impression. But the editor

wishes to reform them. But he is certainly under a misapprehension in supposing that these unconstitutional laws can be made constitutional by being made more definite. That is a great difficulty, certainly, but not the greatest.

The trouble is, as the argument proves in the speech which he says is unanswerable, that no postal laws on this subject can be enforced at all without abridging the freedom of the press, because they involve espionage and decoy as the only possible means of their enforcement.

The poison is the very substance of them. Judge Field, in the Opinion of the Court, points out these inquisitions as the only means by which these laws can be enforced, and they are the only means that hav been or can be practically used. The Judge expressly says that the party "receiving the prohibited matter may complain," or "the officers of the postal service can act upon their own inspection" "in excluding the prohibited articles or refusing to forward them," and such official may also make the complaint, of course.

Now, the "unanswerable" argument goes to show that no power of this kind was ever dreamed of under the Constitution, and that its exercise is a direct violation of the freedom of the press, and of the freedom of property from seizure granted by the Constitution, and that it is a means of inquisition "utterly inconsistent with the genius of free institutions," as the League resolved at Philadelphia.

I hav repeatedly and respectfully requested the editor to draft a statute that shall be free from "vagueness and indefiniteness" and which shall hav any practical value without involving these very objections which hav made my argument "unanswerable." The general talk about "reform" is of no possible use in such cases as this; if the thing can be done, he is under the deepest obligation to show *how* it can be done. Until he gives us a reformed Comstock Law he is clearly guilty, not only of "vagueness and indefiniteness" himself, but is guilty of making a schism in the Liberal ranks without any sound, clear, or sure ground to go upon. Vague declarations about "reform" and "purity" and "principles" amount to nothing. Let us see the unconstitutional law "reformed" in to a constitutional one, or let us hav silence on this whole subject.

The editor intimates that the elements needed are certainty of definition, and inquiry into the "intention" of the

sender. But "legal definitions of any crime" must be by acts, words, or things; and "obscenity" is neither, unless *all* of the acts, words, and things are described. Let the editor give them! And, again, when it comes to "intention," what legal process can ever reach and determine that? Only one tribunal has sat upon the intentions of men, and that was the Inquisition itself!

Lawyers of the greatest skill have given up the framing of such laws in despair. I have tried far enough to appreciate their difficulty. As an introduction to this task let me ask the editor to reprint a remarkable letter of the great American jurist and perhaps our greatest codifier, *Edward Livingston*, found in his Life by C. H. Havens, p. 289 (Appleton, 1864), and which was reprinted in the *Boston Traveller* of July 15th and *The Word* of August last. But Livingston's difficulty, insuperable as he found it, was with the definitions only; he did not propose to discover and punish intentions too. By the time the editor has disposed of both difficulties I believe he will find that the only practical reform of the Comstock law is the Shaksperian cry, "Oh, reform it altogether!"

Another important agreement to be observed is that by the admission above quoted the editor has placed himself with the rest of the Liberals in direct opposition to the U. S. Supreme Court on this subject. It is merely inconsistent cruelty, therefore, for the editor to refer to the presumption of my "individual opinion" as against the Supreme Court. Though I am "merely an attorney," I have as good a right to dissent from the moral and political and constitutional opinions of that court as the editor. But his position will help all Liberals to see the absolute necessity of such dissent; and that the grounds of the speech in that regard should be really and practically admitted by this position of the editor himself is a great step of progress.

II. Another agreement which the discussion has happily brought out is the abandonment of the second plank of the Cant Platform upon which the editor required all Liberals to stand at Syracuse or suffer the terrible consequence of his indignant abandonment. In my former letter to *The Index* this plank was quoted by carefully (not carelessly, as the editor supposed) omitting the words in it relating to the state, so that its statement on the National or Postal Law question could be seen at a glance; thus stated it affirms: "The right

and duty of Congress to pass, and the right and duty of the National Courts to enforce, laws to suppress the circulation of obscene literature, *including* the exclusion of such literature from the United States mails"

It will be seen at once that this all-important plank, upon which the editor insisted we must all stand or go under, goes to the full extent of asserting the unlimited jurisdiction of the United States over the whole subject of suppressing the circulation of obscene literature, and that only as an item of that general jurisdiction he *included* the exclusion of such literature from the United States mails.

That this was the editor's former view is clearly evident from his editorial of September 26th, in which he argues at length for what is summed up in these words:

"The powers of Congress are nothing but the powers of the people itself as a whole; for Congress is only a representative body deriving all its powers from the people it represents. To limit its powers, therefore, is to limit those of the people."

Again, in his editorial of October 3d, he derives this general power and jurisdiction of the National Government from the nature and enormity of the "crime" itself. He says there is a moral justification for treating this business as "a crime, not only by state but also by national legislation." "It is in strict accordance with the spirit of the U. S Constitution to interpret it as giving *jurisdiction over all crimes* which, from the nature of the case, cannot be brought under the jurisdiction of the separate states. The crime of *counterfeiting* is of this nature since the power of coining money is conferred upon Congress alone; and the crime of mailing obscene literature is of this nature, since Congress alone has or can hav the power to regulate the Post-office system."

Here we hav the repetition of the general jurisdiction doctrine of the Card with a vengeance! Because any act is very bad it is worthy to be "a crime," and if the states cannot reach it conveniently, then the Constitution authorizes Congress to create it into "a crime" and punish it! Thus Congress can acquire unlimited criminal jurisdiction from its judgment of the criminality of acts and the difficulty of the states in punishing them! Can this be seriously pretended? Is it possible that the editor wrote what is above

quoted after he had "thought out the subject in all its bearings?"

It seems not, for by his own admission in the next editorial in the same paper, in reply to my letter, which pointed out the absurdity of this general jurisdiction plank, he says of that Card:

"*It was not intended to force the jurisdiction of the whole subject upon the United States Government, nor do we think the wording at all suggests any such extravagant posit on.* But we take this opportunity to state that the platform in the 'Card' is not proposed for adoption *in form* by the League; it simply states the principles of the signers, which will be fully 'approved' if the League in any manner adopts unequivocally, by a simple majority vote, the policy of seeking to 'reform' and not to repeal the Comstock laws."

Now, the foregoing is a frank and plain withdrawal of the very plank upon which the "reform" rested in the Card We were expressly told that the right and duty *to exclude* was "*included*" in the right and duty of Congress to pass, and of the national courts to enforce, laws to suppress the circulation of obscene literature. Now, if this general jurisdiction claim is abandoned as an "extravagant" and ridiculous blunder, what becomes of the right of "exclusion" which was "included" in it? Why, of course, that falls with the right and duty in which it was included. The part goes down with the whole. What ground is left, then, upon which the editor demands that we must still vote for "reform?" He asks us to vote for reform upon, and as necessarily included in, a "great principle" which he abandons as soon as its "ex ravagant" nature is pointed out to him, and yet he insists that his "principles" will be approved if we will only vote for "reform," although the very ground he rested it upon has dropped from under it.

But after the bottom is gone, why are we still asked to stake our all upon a "reform" that all experience has proved to be impossible? Must we, simply as an act of faith in him, take it like a pig in a poke?– and that after finding that the very plank he provides for the reform to rest upon is so "extravagant" that it breaks with the first footstep. We are tempted to ask again, Has this editor "thought out the subject in all its bearings?"

By the admission above made, if he really means and

understands it, he comes back to the old and safe grounds of the speech, which would end all differences at once, to wit: "The power possessed by Congress embraces the regulation of the entire postal system of the country" *for postal purposes; but not for moral, religious, political, or any ulterior purposes.*

III. But no sooner is the admission made than he goes to work to invalidate it; and that brings us to a third point. He tries to revive the notion that the power to create and to legislate against "*the crime of mailing obscene literature*" is "an incidental power" necessarily implied in the power "to establish post-offices and post-roads."

In the speech criticised this matter was so thoroughly disposed of that no reply is needed to those who will read and heed what is there said. It was there shown, in the words of Henry Clay, that the mere *mailing* of anything is not and cannot be made a crime, and can never be lawfully so legislated by Congress under the Constitution; that the post-office can never be made a source of criminal jurisdiction or means of detection for the purpose of punishing even the crimes which are named in the Constitution as within the jurisdiction of Congress, to say nothing of making *new crimes* which it has no right whatever to create. It was shown that any attempt to punish crimes by espionage or decoy laws could only detract from the use, income, and "convenience" of the postal service; that, instead of being "appropriate to" postal ends, they were detrimental, expensive, and useless as such, and could have no use or justification, unless attempts to use the post-office for supposed moral purposes, *i. e.*, for "ulterior purposes," could be justified; that until a part could be greater than the whole, no justification for such purpose was possible under the postal grant of the Constitution.

The editor dissents, but makes no serious attack upon these positions—as, indeed, who can? They stand as they did in 1836 when Daniel Webster said in the Senate that he was "shocked" at the claim to the contrary, and that the prohibition of the mailing of anything on account of its meaning was "expressly unconstitutional," and the Senate agreed with him. The editor, however, refers to two items, really taken from the speech, which seem to him inconsistent with this position. One is *counterfeiting*, and the other

postal cards. These seem to me amusing items to be brought forward by one who has "thought out the subject in all its bearings."

Counterfeiting is referred to in the speech as one of the crimes expressly placed by name within the jurisdiction of Congress (Art. viii, § 6, of the Constitution). Moreover, by § 10 of the same Article all of the other crimes which the United States are allowed to punish at all are declared to be "*piracies and felonies committed on the high seas, and offenses against the law of nations.*" All other crimes are expressly reserved to the states, except treason, which is specially provided for and *defined* in another Article, so that Congress could not, by definition or pretended incidental powers, get further criminal jurisdiction of any kind.

Now, the editor argues that counterfeiting is really an incidental power under the express power "to coin money," etc., and that the newly made "crime" of mailing obscene literature is similarly an incidental power under the express power "to establish post-offices and post-roads." He therefore declares them both "to be of the same nature," and concludes that if one is constitutional the other must be.

The answer is that the Constitution has *expressly provided* that Congress shall punish counterfeiting, and has no word whatever that looks towards making a "crime" of mailing anything, or punishing obscenity in any way. It is true that to punish counterfeiting might be considered an incidental power under the grant "to coin money," etc.; but the editor will find that it was just for that reason that the authors of the Constitution dragged it out of any such possibility and put it in expressed words. They expressly, as the debates show, used every precaution to prevent the inference of criminal jurisdiction from incidental powers, and thus in this only case where it might hav been implied they even inserted a separate clause rather than hav it left to inference. Now the well-known rule of construction is that the expressed inclusion of one instance in a grant is the exclusion of all similar instances of power. The *expression* of this only instance of incidental *criminal power* excludes all other instances and means that they are not to be implied. It shows that the authors of the Federalist were entirely right in saying that this postal power "must, in every view,

be a *harmless* power." By "harmless," the contemporary discussions show they meant free from *usurpation* and *criminal jurisdiction*. The editor would make mail carrying the unlimited source of both!

(2) The next point the editor discovers is that the speech is inconsistent in regard to postal cards; but he is mistaken again.

The speech says: "With the meaning of the documents INCLOSED, the Post-Office has nothing to do; and if they have not, Congress has no power to punish for sending them."

Again it says: "It's repeal [*i. e.*, the repeal of the Comstock law of 1873], is justly called for upon both grounds in the petition referred to," that is, on the ground of its unconstitutionality and its impolicy, or wickedness. But in "thinking out the subject in all of its bearings," each clause of the Comstock law was considered, and the clause relative to postal cards was disposed of in this way in the speech:

"A post-office regulation, that all matter should be INCLOSED, and that *postal cards* should contain nothing that could be offensive to those to whom they are sent, or to the public, is all that is necessary. This matter of the postal cards is not rely in the power of the department as a NECESSARY POSTAL REGULATION." "It is evidently put in the law in question *only* to give it the color of necessity. If it is thought best to retain the form of the law, it should be materially modified so as to be within the postal powers and purposes only."

Now the editor imagines that there is great inconsistency in these quotations, simply because he overlooks the all important difference, expressly pointed out, that in the first case *inclosed* matter only is treated of, which differs entirely from postal cards in which publicity is compelled by law, and for postal reasons; in the latter case the same reasons compel that they should be inoffensive to the receiver and not exciting to the public, otherwise that part of the postal service could not be maintained at all, much less worked conveniently. As it is, we are told that this enforced publicity is the great objection to their general use and to their safe and punctual delivery. It is said and believed that often the real excuse for their tardy delivery or loss is that

the postal employees and their friends hav not had time to decipher them. The postal reasons for reducing this disadvantage of the postal card service to a minimum are too apparent and practical for doubt, and such reasons hav dictated the restrictions wherever this *new* system has been adopted as the first and necessary condition of its existence.

Again, that this service is a *new* postal provision, not intended under the Constitution, may leave it under the discretion of Congress to provide how it shall be used as a condition of granting it at all, as in the case of the postal-carrying of dry-goods and parcels of merchandise. But letters, papers, pamphlets, and sealed packets were, and are mail matter under the Constitution, which Congress cannot interfere with.

There is no inconsistency in the speech, then, in suggesting that these regulations should be those of the Department only, and that they should be limited to postal purposes, and to ordinary postal fines in case of complaint, thus repealing the cumbersome penal laws, penalties, and proceedings which are not ridiculous on this trivial subject only because they are terrible.

But notice the further fact that even this postal interference is allowable only when enforced *publicity* requires it. It therefore excludes the conclusion that it can be rightfully allowed as to *inclosed* matter where there is no such reason for it. Where the reason ceases, the law ceases; and the inclusion of it in the one case, according to the rule above cited, necessarily excludes it in the other. So far from there being an inconsistency, the postal-card regulations, like the counterfeiting illustration, lead to exactly the opposite conclusion the editor supposed, and sustain the speech. Thus, when a "subject is thought out in all its bearings," truth is ever confirmed.

The above three points dispose of the constitutional and most important aspects of the subject; and as to them it is clear that the editor has admitted or confirmed the conclusions of the speech. His "reform." of the Comstock postal laws will, therefore, hav no legal basis to rest upon, even if he could make them safe to liberty, and practical, which he cannot.

IV. Here we might rest the discussion, but for some grave

misapprehensions he is under as to the bearing and importance of the questions involved.

The first we will notice is a fatal misapprehension as to the legal and practical importance to liberty of preserving the constitutional provisions, clearly defining and limiting the Federal jurisdiction in criminal matters. It really seems that the editor has forgotten all about the Constitution and the wisdom and statesmanship that formed it. How else could he write in this way ?

"So far as freedom of speech and of the press is concerned, he [Wakeman] must either deny the right of the states, or else concede the right of Congress, to suppress literature that is really obscene. Freedom is violated by any unjust restrictions, and it makes not a pin's difference by what authority the restrictions are imposed. The protest of principle must lie against the restrictions themselves. Mr. Wakeman destroys his own case by conceding the justice of the restrictions when imposed by state authority, and yet inveighing against them as tyranny when imposed by Congressional authority. In consequence of this radical and fatal self-contradiction, the view he presents of the whole subject is merely that of the attorney ; he has not treated it either as a Philosopher or Statesman."

Again hear him:

"The fact is that Mr. Wakeman has not thoroughly thought out his subject in all its bearings ; he has treated it in too narrow and technical a manner. The powers of Congress are nothing but of the people itself as a whole ; for Congress is only a representative body, deriving all its powers from the people it represents. To limit its powers therefore, is to limit those of the people," etc., etc.

It seems to me incredible that a President of the *Liberal* League can write in this way. Talk of statesmanship ! when the great labors of all the statesmen we hav ever had, hav been to prevent the establishment of a Federal tyranny. The safest way to be a Philosopher and Statesman is to follow in their footsteps. In every convention and meeting that passed upon the Constitution in its formation ; in every administration that has shed glory on the Republic since then, the point was and has been to defend the states and people from the tyranny and usurpation of the General Government, backed when possible, by the Supreme Court. I

pray the reader to continue the line of argument of the speech into the works and records of those who adopted the Constitution, and I will gladly leave the question of "statesmanship" to them The very theory of our Government, as well as the traditions of liberty, are in danger of being lost when our Liberal teachers write in the mingled ignorance and indifference above quoted.

As Patrick Henry pointed out usurped power is "tyranny," and is irresponsible and unlimited. If Congress can create and punish crimes without regard to the Constitution, it is the end of all popular liberty. The only protection the Liberal party and Freethought can hav against the whim of a majority is gone. All that was said in the speech about the necessity of insisting upon the true position of the Supreme Court as simply a *legal* tribunal, and not an arbiter of morals, religion, or liberty, is the voice of statesmen, and derives strange force when it is found that the President of the Liberal League is ready to surrender "the Bill of Rights," which is the only possible protection of the free, thinking minority. Suppose that Jefferson, Jackson, or Lincoln had done so, where would we hav been? It is clearly the first duty of a Liberal to stand by the Constitution and its Bill of Rights as the fountain of all our liberties. When that is frittered away by giving Congress the power to create and punish crimes, the temporary party majority is simply an irresponsible tyrant. It will wield a vast judicial and criminal system foreign to the people, and before it the individual will be as helpless as before a Russian Czar.

The great purpose of the Constitution was to "protect liberty" by keeping the individual before the legislature, judge, and jury of his state and vicinage, and under laws that he could hav some influence in making, executing, or changing. These are the very conditions of liberty, and the Federal Government can only protect them; it cannot supply or replace them.

These very Comstock laws are a practical illustration of this vital distinction. All of the outrages hav been under the United States laws and by Federal judges and officers. Under the state laws, even in New York, unconstitutional as I think they are there, no great wrong has as yet been consummated, and there is less danger now than ever, for

the state officers and grand juries are recovering from their obscenity panic.

I am not now called upon to determine what restrictions the state should impose to suppress obscenity. I simply say that those which were in force before the United States usurped this jurisdiction were in fact found to be sufficient. That the evil was practically removed under them before these postal laws were passed, and to those state laws, or to others which the people may have a rational knowledge and control of, I propose to return. I leave the matter to them. The editor has not shown how otherwise the Constitution and our liberties can be preserved.

V. The editor is under similar *misapprehension* in regard to the position of Liberals on the subject of obscenity. Because they do not deem it necessary to throw overboard the Constitution and all their liberties to get it punished, he represents them as in favor of it, and so has been the cause and source of unlimited misrepresentation, if not of slander. He says, for instance, in italics: "*Freedom of the press covers and includes the legal right to publish, circulate, and mail real obscenity!* This," he says, "is exactly what Mr. Wakeman's argument means so far as the mails are concerned."

Again, when I tried to show that the "principles" underlying the discussion were common to us both—viz., that both "were in favor of liberty and opposed to obscenity," and that the real object was to discover the true, lawful, and practical way to secure the first and to avoid or repress the other—he will have none of it. He replies indignantly:

"He [Mr. Wakeman] is greatly mistaken in imagining that there is 'no material differences as to "principles."' He declares that 'all are in favor of liberty and opposed to obscenity.' It is true that all Liberals are in favor of liberty, but it is not true that all Liberals are opposed to obscenity. Can a man be said to be opposed to murder who demands the repeal of all or *any* of the laws which punish it? We certainly think not. The trouble with 'repeal' is that it would abrogate some or all of the laws which punish the crime of circulating obscenity, and thereby, no matter what the *intention*, does *in fact* protect and foster that crime. If there is any real answer to this, let us by all means have it."

Certainly. You shall have it; but it seems strange that any answer should be needed. Liberal people, and all sen-

sible people, are not *in favor* of crimes because they want them discovered and punished constitutionally, by the proper authorities provided by law for that purpose, and by methods that will not work far greater harm to society than the injury of the crimes themselves. There is nothing so dangerous as a panic. The editor seems not to hav recovered from the obscenity panic from which the whole country was suffering as the result of a few sensational newspaper articles and some real cause in 1872, and which gave us Comstock and his laws after the real evil had been removed by the state laws and public opinion, as I believe will always be the case.

The editor condemns us upon a very amusing "principle." If, he argues, a thing is *very* wrong, then it is a *crime*, and then it has *no rights* anywhere, or when, or how; and anybody may punish it in any way, lawful or not; and if any one does not do so or favor doing so, then he acknowledges that the crime has "legal rights," and he favors and fosters it whether he intends to or not.

This feels to me like the logic of Judge Field's opinion, and I fear the editor has absorbed it from that source. Let us try it on. *Libels* are very wicked and villainous, and are generally circulated through the mails. An editor often on the mere word of a private correspondent abuses his tremendous power to charge evil acts, intentions, and even crimes that injure and often practically ruin and murder his victims. I believe such offenses are very wrong—*are crimes* that make obscenity itself appear white, and so the laws of all civilized countries declare. But shall we ask Congress, which has nothing to do with it under the Constitution, to go to legislating on the subject and to declare the mailing of a libel a crime, punishable with death, in the United States courts; and to be discovered by espionage of mail matter, and induced by decoy? Or shall we resort to lynch and mob law? Certainly not. We will hav the states make reasonable and sensible laws on the subject, and will try to have those laws reasonably and effectively enforced by the proper courts and juries of the vicinage. So we deal with forgery, treason, swindling, and many other crimes in the commission of which the mails are constantly used. Yet because we punish these crimes only through the states, do we favor or foster them?

So as to murder, to which the editor refers. Many excellent persons believe that society has advanced so far that the death penalty for it does more harm than good, and they ask its abolition; but are they therefore in favor of murder? Not long ago every felony was punished with death. The scaffolds were constantly hung with victims or red with blood. Civilization has been measured by the abolition of these penalties, and cherishes the memory of those who labored for their abolition. Now are we to be told that they did it all because they wished to favor and foster the crimes? or that they did so in fact?

When the editor recovers from his panic he will see the absurdity of all this, and will regret that he said that "all Liberals are not opposed to obscenity." Such charges should not be made upon mere inferences, for they are misunderstood. The editor began this discussion by saying that "we do not imagine that Mr. Tucker [Mr. Heywood's champion] is any more in favor of obscenity than anybody else." Certainly after that certificate he ought to give the rest of the Liberals a clean bill of health, even though, in the words of Mr. Parton, they do go for "immediate and unconditional repeal" of the Comstock Postal laws, "because they are unconstitutional and wrong in every way, and pernicious in many ways."

When the editor preaches on the enormity of obscenity, as he does so eloquently—I will not say that he does it "merely" as an ex-parson—I listen gratefully and reply only from the "amen corner;" and it is hardly fair for him to represent me as an obscenist because, "merely as an attorney" or otherwise, I try to explain to him what the Constitution, law, and common sense on this subject really are. When he is content to rest his zeal for purity upon *them* I shall be with him.

VI. The editor is under *misapprehension*, also, as to what the people expect of the Liberal party. It is not "sound in principle or policy" for a Liberal party to become the advocates of unconstitutional laws, pernicious espionage, or inquisitions, which have been dictated by "religious" zeal or hypocrisy. To curry favor with an obscenity panic is business that can be better and safely left to Mr. Comstock and his friends. We have no call to compete with them in such rivalry, and shall gain nothing but contempt for the attempt.

The "awakened conscience" of the whole people is in favor of constitutional liberty and common sense on this whole subject. The Liberals are the natural leaders of this sentiment and movement. If they know enough to advance them, they will become the vindicators of the rights of the people and of Man. They will stand forth as a moral and political power in the land. If they fail in this crisis they will have no sufficient reason for their existence. They will struggle along scarcely worthy of the notice or of the contempt of their opponents. Let them take the watchwords, LIBERTY AND PURITY, NOW AND FOREVER, ONE AND INSEPARABLE! The future will then find in them the great, because the reforming, growing, and moral, influence of the country; for *the free* and *the pure* will certainly "inherit the earth."

New York, October 10, 1878.

THE IMMORALITY OF REFORM.

"CRUSHING REASONS" FOR REPEAL

BY T. B. WAKEMAN.

To the Editor of The Index: I regret more than ever that my answer to *The Index* criticisms did not appear in your last issue as intended, for if fairly considered it would certainly have saved the editorial that did appear. You could not have then written as follows:

"To demand that there shall be no laws against the mailing of obscene literature is necessarily to demand that that crime shall go unpunished; and to demand that crime shall go unpunished is a glaring violation of political morality."

Here you assume two things which you have never proved, and the contrary of which was clearly shown.

1. The simple mailing of a thing is not a crime and Congress cannot create it into "a crime." As Henry Clay said as to "incendiary" literature, it is all harmless in the Postoffice. It is the "*circulation out of the Postoffice*" *that makes the offense.* And that "crime" must be discovered and punished just as libels and all other crimes are by the states and not by the General Government which has no Constitutional power over them whatever.

2. You assume that those who favor the repeal of these "Postal Laws" as unconstitutional, immoral, "wrong in every way and pernicious in many ways," necessarily demand that the circulation of obscenity shall go unpunished, and this you say is the position of "repeal."

Now the exact reverse of this is the truth.

The fact is that all the obscenity there was, was and could and can only be suppressed by state laws. The mailing and every form of circulation can only be reached by them. This was all practically done before the Comstock postal laws were passed in 1873. Only the state laws that strike at the root and reach the printing, manufacture, and circulation in every form, including *expresses and the mails,* can be effectual. Postal laws cannot prevent the circulation of obscenity, for it has a hundred means beyond them. There must be state laws; they were efficient—why not continue to use them until they fail? All these *postal* laws have done is to introduce "espionage and decoy," which have out-

raged justice, liberty, and morality in pretending to punish "crimes" they have produced or induced.

You choose to represent the position of those who favor repeal as "UTTERLY IMMORAL." Thus you seek to frighten the unreasoning and the timid. Such misrepresentation may delight your orthodox opponents like the "*Statesman*," but it should make the fair and judicious grieve. When you delight that paper expressly established to overthrow the League, and put God in the Constitution, can you not see that you are in the wrong? Your course gives the "orthodox" all they want, to wit, the Constitutional *power* to dispose of free thought and the liberties of the people as they wish. They always, the *majority*, will consult their views and tastes, and *not yours* in the disposal. All Liberal literature, in the words of Judge Field's Opinion, is "deemed injurious to the public morals" in their minds. This is the time for meditation over the fate of the silly sheep who trusted to the flattery and promises of the wolves instead of their own faithful dogs and fold.

Now as to the morality question. You have stated exactly the reverse of the truth. The cause of "genuine morality in politics, freedom, and virtue" which the League was designed to establish, make it plainly necessary for all friends of the League to vote for the repeal of these "wrong" and "pernicious" laws. This is the ONLY MORAL POSITION. When the fog of metaphysical declamation clears away, these solid moral truths remain:

1. It is gross "immorality in politics" to try to violate and prostitute the Constitution and laws of our country to purposes they were never intended to cover, and thereby;

2. To break down the only protection to liberty our fathers gave us, so that the freedom of thought, of speech, of the press, and even of our property from seizure, shall mean no more than the whim of a majority in Congress, which the "orthodox" can always control.

3 It is immoral to destroy our free post-office by establishing an *espionage* over it and the sentiments of the people, thus taking away the liberty, equality, and confidence of the people before and in the government; as the laws in question do and must do to be of any use at all.

4 It is immoral, and "wickedly wrong," to pass laws that can be executed only by "decoy," so as to make crime

in order to punish it ; as these laws do and must do, in the interest of officials, sects and agents.

5. It is "immoral in politics," and in every way, to pretend that Congress can create new crimes contrary to the Constitution, out of the simple act of mailing an inclosed paper, and that it can thus acquire unlimited Federal criminal jurisdiction over the lives, liberty, and property of the people.

6. It is immoral to represent and teach that good can come by making crimes and punishing them without regard to the Constitution, and in violation of the rights and liberties of the people.

7. It is immoral to add to and foster the immorality of obscenity by pretending that it can be suppressed by any post office laws, when, in truth, they cannot reach it, and can only add to that "crime" the guilt of espionage, decoy, and illegality, while it can only be practically and legally suppressed by state laws, which will reach its printing, manufacture, and circulation in every possible way, as they hav done when enforced, for one hundred years.

8. It is immoral and fraudulent ("whatever the intention of the parties may be") to continue to represent that "*reform*" can get rid of the unlawfulness, and immoral and pernicious consequences inherent in these postal laws, without being able to show, or even trying to show, how it can be done.

9. It is immoral to represent that the liberties of the people are, or can be, as safe under the usurped and irresponsible criminal jurisdiction of the Federal Government as they would be in the states and before courts, and officers, and juries of the vicinage.

10. It is "immoral in politics" and in every way to make the Liberal League an instrument to sacrifice the real, permanent, constitutional rights and liberties of the people to a causeless obscenity panic, gotten up chiefly by those who wish now to use it, by means of these very laws, to crush liberty and Liberalism out of existence.

11 It is immoral to ask the Liberal League to become the accomplice of its adversaries in betraying the liberties of the people.

This is enough for those who will stop and think. For these moral and "crushing reasons," and because "*the Lib-*

eral League is, as you say, *shaped symmetrically*," it must stand by "genuine morality in politics and freedom" by voting for the repeal of those laws; because they are really immoral, futile for good, the inevitable cause of outrages, injustice, and wrong—and in every way "inconsistent with the genius of free institutions," as the League declared at Philadelphia.

The five "crushing reasons" in your last editorial are exactly reversed by the above considerations, and, like stones too heavy for the heaver, roll back and crush the one who moved them.

Yes! You are right; the League "cannot afford to deny its own foundations." "It is built upon respect for morality," not upon hypocrisy, nor so-called "respectability," nor the breath of Mrs. Grundy, but upon good, true, substantial, common-sense, practical, constitutional "morality in politics" and out, "*and on freedom*," as the only cause and foundation of "*virtue*." If the *Liberal* League is true to its name, its cause, and itself, it will be not a sham nor a traitor, but a power to effect these results by the repeal of those laws which violate them all. Yours respectfully.

New York, Oct., 17, 1878.

The Liberty of Printing.

AN ADDRESS AT THE SECOND ANNUAL CONGRESS OF THE NATIONAL LIBERAL LEAGUE, AT SYRACUSE, OCT. 26, 1878, BY THE HON. E. P. HURLBUT, OF ALBANY, N. Y.

Mr. President, and Brethren of the National Liberal League—Ladies and Gentlemen: My subject is "The Liberty of Printing"—a matter of the utmost concern to an enlightened age, and priceless in a land of freedom; and should I stumble under its weight, by reason of age or infirmity, I trust that, in your charity, I may hav credit at least for good intentions, which are considered by some as not a mean order of talents.

The Liberty of Printing—what is it? It is, speaking figuratively, to enjoy an intellectual atmosphere as free as the material one which we breathe, being on our guard against impurities.

It is to stimulate and be stimulated by the oxygen and ozone of the cultured human intellect, avoiding the deadly malaria lurking in the marshes and sewers lying at the base of the depraved mind.

It is the parent of science, the educator of our race, the unfettered moral and intellectual giant, under whose tread and at whose call mankind hav torn the serf's collar from their necks, broken the chains of kings and emperors, and compelled pope, prelate, and priest to giv a reason for the faith that is in them, or thenceforth to resign their leadership of mankind.

In France it demolished the Bastile; in Spain it abolished the Inquisition, and in New England Cotton Mather as an "institution;" although the latter died hard, maintaining with his latest breath "that there is a God, a devil, and witches."

Public sentiment, stimulated by the press, abolished the

slave trade in Great Britain, slavery in her West India colonies, and finally slavery in these United States. It consolidated Italy, and shut up the vicegerent of heaven in the Vatican. Without the liberty of printing, a democratic republic cannot exist; a plea for the former is a plea for its life.

Thus knowledge, science, virtue, human enlightenment, and progress—law, order, and free government—are founded on books, as the world was once fabled to rest on Atlas. We hav been taught to reverence *the* Book; let us rather hold all good books to be sacred.

But all books are not good; and here we encounter a difficulty which the wisest philosophers, jurists, and statesmen hav been greatly embarrassed in their attempts to remove.

Attend to one of the most gifted of mankind, treating of this subject. "I deny not," says he, "but that it is of the greatest concernment in the Church and Commonwealth to hav a vigilant eye how books demean themselves, as well as men, and thereafter to confine, imprison, and do sharpest justice on them as malefactors: for books are not absolutely dead things, but do contain a progeny of life in them, to be as active as that soul whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. I know they are as lively and as vigorously productive as those fabled dragon's teeth, and, being sown up and down, may chance to spring up armed men.

"And yet, on the other hand, unless wariness be used, as good almost kill a man as a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself—kills the image of God, as it were, in the eye. Many a man livs a burden to the earth; but a good book is the precious life-blood of a master spirit, embalmned and treasured up on purpose to a life beyond life. It is true, no age can restore a life, whereof, perhaps, there is no great loss; and revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse. We should be wary, therefore, what persecutions we raise against the living labors of public men—how we spill that seasoned life of man, preserved and stored up in books; since we see a kind of homicide may be committed, sometimes a martyrdom;

and if it extend to the whole impression, a kind of massacre, whereof the execution ends not in the slaying of an elemental life, but strikes at the ethereal and fifth essence, the breath of reason itself—slays an immortality rather than a life."

Thus wrote that great scholar, statesman, and poet, John Milton, on "The Liberty of Unlicensed Printing." His argument was designed to overthrow a statute, then in full force in England, "To regulate printing, that no book, pamphlet, or paper shall be henceforth printed, unless the same shall be first approved and licensed by such, or at least one of such, as shall be thereto appointed." The statute once abolished, he claimed that all printing should be free—except that authors should be held responsible for the abuse of their freedom; or, to use his own words, that the law should "thereafter confine, imprison, and do sharpest justice on them as malefactors," for the printing of offensive books.

How are we to enjoy the benefit of good books without incurring the evil of bad ones?

In the olden time it was attempted to draw the line in Greece; and books which were regarded as Atheistical and blasphemous, or libelous, were burned, and the authors banished. Of books tending to voluptuousness they took no heed; and an ancient poet complained that for this reason there was a dearth of chastity.

Ancient Rome did but little on the subject; some books were condemned and burnt—books that were blasphemous—but a censorship was never established until after the invention of printing, when the popes were alarmed at its influence in the diffusion of knowledge. They prohibited the printing of certain heretical books, and forbade their subjects to read them, by their famous Index, under pain of censure or excommunication.

This censorship spread over Europe like a malarious atmosphere, until even liberty-loving England at last embraced it. But as she was the last to adopt, so, let it be remembered to her honor, that she was the first to abolish it; and now, so far as I know, the main, if not the only restrictions which are in practical operation on the liberty of the press in that country are in reference to libels on private character, and obscene books, prints, drawings, and pictures.

In these United States there has never existed a censor-

ship of the press; but of late it has been compelled to attend to a grim farce, in which a notable Paul Pry has been the sole actor. Such has been the success of his performances that he has completely "brought down the house"—but mainly, I trust, on his own head. Now, while I do not object to the ostensible aim and object of this procedure,—to wit, the suppression of obscene literature—I protest, in the name of liberty and human rights, against the course and manner of it, as low and mean, too cunning to be innocent, too sharp to be honest, oppressive, and at war with the whole theory of administration in a free government.

Let us examine this subject, with a view to secure the just freedom of the press, and at the same time to prevent so much of its licentiousness as is practicable. I know this is delicate ground, and is rendered doubly so under our complicated system of government; so that we need all the lights of the law, and of human experience and philosophy, in order to achieve success.

Now, as I have said, England intends that her press shall be free; and yet in the reign of her present beneficent queen she has passed statutes against obscene books, pictures, etc., and endeavored to suppress them.

The wilful exposing of an obscene print, or indecent exhibition, is an indictable offense at common law, ranking with the indecent exposure of the person. As there is no *absolute* freedom for man in the social state, so there is and can be none for the press. All social and moral freedom is limited by rights. There is a natural, and there is a civil freedom; and the latter only is accorded to man in the social state. The first, if he were the only ape-like man existing at the beginning of our evolution, was absolutely free. But the moment he came to have peers, he found he had to conduct within certain limits, which respected the rights and feelings of others, or he would be treated not as a respectable Adam, but rather as the first "tramp."

At length, after long ages of experience in the social state, the idea of not doing to another what he would not have done to himself became seated in the fibres of his brain, and was transmitted by heredity, so that now the essence of all morality and all law may be summed up in a precept of eight words, and can be taught without express

revelation or a burdensome priesthood, to wit, *Be just and kind to all sensitive beings.*

There is, as I was saying, no liberty in the social state which has not respect to others' rights and feelings. You may not slander a man or woman without being amenable to the law; and yet this responsibility, which is a decided infringement of the absolute freedom of speech, obtains in every state in the Union.

The constitutions of these states all, however, declare that speech shall be free; but by what language do they declare it? In this—to wit: "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right;* and no law shall be passed to restrain or abridge the liberty of speech or of the press." And in the New York Constitution it is written that "in all prosecutions or indictments for libels, the truth may be given in evidence," clearly showing that the constitutional freedom of speech and of the press, thus secured to every citizen, was to be limited by the rights of others; that libelers should be held responsible as for an abuse, and that the just restraint and punishment of the licentious exercise of that freedom was not to be regarded as a violation of it.

If by the words, "being responsible for the abuse of that right," it were intended to limit such abuse to libels on private character, as some contend, why did not the framers of the Constitution say so in exact words, instead of employing a phraseology which implied a great deal more? They were familiar with the common law, which went further, and condemned as offenders as well the authors of obscene prints, drawings, and pictures as others who offended against good morals and manners.

The Constitution of Louisiana in the days of Edward Livingston declared that "Printing presses should be free to every person who undertakes to examine the proceedings of the Legislature, or any branch of the government; that the free communications of thoughts and opinions are one of the invaluable rights of man, and that every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty.*"

Mr. Livingston was appointed a commissioner to frame a criminal code under this Constitution. He was a truly

great man, statesman, and jurist. No American lawyer ever enjoyed a higher reputation, either at home or abroad. He was a firm supporter of the liberty of the press, and his code provided penalties against its infringement. He was liberal in his views of religion, and expressly provided, for the first time in this country, that the religious opinions of a witness should neither affect his competency *nor his credibility*. His code as reported was the admiration of jurists and publicists all over the world, and will endure as a perpetual monument to his fame. I feel the utmost assurance that, in framing the law on this subject, Mr. Livingston weighed most critically all the objections that can be raised against a law punishing the authors of obscene prints. While deliberating on the provisions of the common law as to the offenses of a moral nature, he had doubts and misgivings as to what portion of them he would embody in his code; and, "while yet he had formed no decision," he wrote to a learned doctor of the civil law, expressing his doubts and difficulties, asking for advice and suggestion, and saying that one of his embarrassments arose from "the difficulty of defining the offense." He objected to the "general expression of the English law," as "putting too much power in the hands of a fanatic judge with a like-minded jury." But after full reflection, he at last settled upon the following as a safe and salutary law, and reported it to the Legislature of Louisiana for enactment.

Title sixteen of his code concerns "Offenses against Morals," and the second chapter of this title provides for the punishment of "Offenses against Decency," the first section whereof is as follows:

"If any one shall make, publish, or print any obscene print, picture, or written or printed composition, manifestly designed to corrupt the morals of youth, or shall designedly make any indecent or obscene exhibition of his person, or the persons of others, by which pudicity" (modesty or chastity) "is offended, he shall be imprisoned not more than six months, or fined not more than one thousand dollars, or both; and the imprisonment, or a part of it shall be in close custody."

This statute he considered to be in entire harmony with the liberty of the press, as secured by the American Constitutions; and I emphatically concur in his opinion, and see

now how wise and guarded is the law he proposed. The print or picture must be "*obscene.*" The instinct of every man and woman of ordinary intellect and common modesty defines the meaning of that word. You seem to need hardly any explanation about it, any more than you do to define the peculiar odor of that animal of which this country is so happy as to enjoy the monopoly, and known to our natural history as *mephitis Americana.* Your sense of smell defines his odor. So in the case of an obscene picture; you look at it, and turn away offended, disgusted. You read the obscene book, and are shocked in every modest fibre of your brain. If you need any further guide, the common law everywhere prevalent will supply illustrative cases.

But this wise and cautious law-giver did not stop with the one word "obscene;" the book or print must also be "manifestly designed to corrupt the morals of youth"—the author having the wisdom to forsee that any further abridgement of the liberty of the press would work more evil than good; while the suppression of obscene prints, designed, or mainly tending, to corrupt the morals of youths, was such a beneficial work as no law-giver could properly neglect.

There are those who demand that the statute shall define what it means by "obscenity." With jurors in general it would not be necessary, and it requires their verdict in order to convict. I confess I hav not the capacity to define it by words, so as to preclude all *possibility* of error in the courts. That cannot be done for any law. Perhaps the only thing that can be done would be to specify certain prints that shall not be deemed obscene, which would be saying what is *not* rather than what *is* obscenity. You see the difficulty when the law is applied to pictures, in which case you would have to giv illustrations, in order to be definite, and your statute book itself would become pictorial and immoral at once. The picture defines itself, and so do most obscene prints. A lawyer would say, after adopting Mr. Livingston's provision, leave it to the juries and the courts under the common law, and be sure you have intelligent juries and competent judges.

I hav no objection, however, to a proviso, by which it should be declared that an agument or treatise written in

sincerity and good faith—in which no obscene words should be employed, although its doctrines, if carried into practice, would hav a corrupting influence—should not be deemed within the meaning of the statute against obscene prints; but I feel assured that, when we narrow down the offense, as in the Louisiana code, we shall be reasonably secure from dangerous constructions.

A case has arisen in which the author of a pamphlet, without employing an obscene word, has advocated a course of conduct between the sexes utterly subversive of civilization, the family, and the state; leading to a return to the manners of the ape-like man, or rather to those of the man-like ape. It is a clear case of inverse evolution; of an author, as the phrase is, "exceedingly backward in coming forward," and particularly forward in going backward; but I should pause long before I held it to be obscene in a legal sense, or if so, such a species of obscenity as the law could condemn, without danger of trenching on the freedom of discussion and the proper liberty of printing. It might be indictable in the court of Judge Lynch, as "an assault and battery" on society and morals, and the culprit be punished according to his code, which some are inclined to regard as an implied and necessary supplement to the democratic constitution of government.

When young and sanguine, I published certain essays on human rights, in which I remember to hav argued in favor of their natural origin; and among other things I maintained that a man had a legal right to be a fool, since nature made him so; but that society could not afford to allow him to be a knave, however nature may hav abused him, and now that I am old I see no reason to depart from that doctrine, and I would apply it to the liberty of printing. If there were nothing else to be considered but practicability, think what an army of martyrs would spring up in the literary world under a contrary rule! As the world even now can scarcely contain all the foolish books, including dollar and dime novels, so the prisons could by no means contain their authors; and moreover Dame Nature would have to get up a special evolution of Pillsbury's in order to supply the keepers!

Here, then, I take my stand. I will ask no further limita-

tion of the liberty of printing than the code of Mr. Livingston creates, and I incline to accept no less. It is in harmony with the common law; it is constitutional; it is called for by the cultivated sentiments of mankind; and it is conservative of the morals of youth. If we maintain the residue of our criminal code, let us by no means omit that.

Having now drawn a line of separation between the liberty of the press and its licentious abuse in the state governments, we are prepared to look at the Constitution of the United States, and to see what rule is to obtain in our Federal Union.

We encounter at once the provision in the Constitution of the United States, that "Congress shall make no law abridging the freedom of speech, or of the press;" so that the question again recurs, What is this freedom of the press; and is it one in the states and in the confederacy? I have labored in vain unless I have shown that it is not absolute and unlimited; that the press is not at liberty to print false libels on private character, nor to publish obscene prints or pictures. This would not be freedom, but licentiousness; and it is nowhere written that laws cannot be passed by the proper authorities restraining that. That which the state constitutions and laws ordain on this subject defines the freedom of the press. Nay, the framers of the constitutions of the states and also of the United States, in employing the phrase "freedom of the press," used it in the sense well understood, and as defined by the writers on the common law; and let us see what they say on the subject. Sir William Blackstone, the most accomplished of them all, who wrote before any of these constitutions were framed, holds this language:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints on publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of

one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."

He argues then in favor of punishing the licentiousness of the press, and concludes thus: "And to this we may add that the only plausible argument heretofore used for the restraining the just freedom of the press, 'that it was necessary to prevent the daily abuse of it,' will entirely lose its force when it is shown (by a reasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one when under the control of an inspector. So true it will be found that to censure its licentiousness is to maintain the liberty of the press."

Now, I hold that the phrase, "freedom of the press," means the same in the Federal and the state constitutions, and in all nothing more than *freedom from previous censorship;* the states, and not the Federal Government, having the power to punish abuses.

And now assuming that the states where the printing is conducted by their laws condemn and punish obscene prints, can a paper containing matter condemned by such laws gain any new right or exemption by being placed in the mails? Is it suddenly cleansed there? The obscene print was not free at its birth, and can gain nothing by setting out on its travels through the mails. The stigma and the disability still rest on it. It was never free (except from a licenser), and can never become so until obscene literature becomes innocent and right by the common law and the statutes of the several states. And when that shall happen, it will be of little consequence what matter shall be printed or mailed, for law, reason, and morality will hav departed from the land.

It is a maxim of the law that a man shall gain nothing by his illegal act. A print that has no right to exist can claim no protection from the law, which does not cherish, but rather abates, nuisances. Shall the law, then, not only protect, but carry thousands of miles, and distribute to tens of thousands of people, prints which it condemns as infamous, and whose authors it punishes by fine and imprisonment? Shall the government become an accessory after the fact, and at the same time hold its lash over the head of the

principal? This would be to the last degree unreasonable.

The state and Federal governments *together* constitute a *complete sovereignty* over the press and the distribution of printed matter through the mails, and this would be the sum of their *joint* operations; the state would define and control the liberty of the press, would punish and condemn obscene prints, and imprison offenders; while the United States would circulate such prints to the utmost limits of the very state that forbids and punishes them. The state would fine the offensive author and printer, while the United States would take a fee from them, a reward as carrier, and assist their trade in corrupting the morals of youth. The state would hav acted wisely, but Uncle Sam would hav played either the knave or the fool, and he might devoutly cry "*In God we trust*" forever, and stamp it holily on every poor penny he has got, but he would share the fate of other hypocrites, for nobody would trust him.

Now the power to establish post-offices, and post-roads, and to carry the mails having been delegated as a Federal power, resides in the Government of the United States, to the exclusion of the several states. In executing this power, the Government is clothed with a limited sovereignty, and may do whatever is necessary and proper or conducive to the end of carrying the mails, *so as to answer the intent and object of their institution.* It may appoint and control its agents; may punish fraud, robbery, and other offenses which obstruct, hinder, or prevent the success of the mail enterprise. When it punishes a robbery, or other offense against the mails, it is not for the purpose of a general correction of the public morals, or of enforcing any of the Ten Commandments, but to enable it to succeed in safely delivering the mails. It is the duty of the Government to remove all obstacles to the complete and beneficial exercise of its power, which is useful, beneficent, and concerns all the people. It therefore punishes offenses which interrupt, prevent, or embarrass its operations, lest it should fall short and fail of its duty.

But the power delegated to the General Government was bestowed by the states, which made criminal the printing and sending abroad of obscene publications; and when they surrendered the power of carrying the mails, did they intend to destroy or defeat their own purposes, and to arm an

enemy in the agent which they created that should destroy the efficacy of their own laws? Was it not expected that the power delegated should be so exercised as not only to be beneficial, but innocent in its operation? that in respect of the matter carried, the states and the United States should act in concert? that the latter should not disseminate what the former stamped with infamy?

Would the state itself, if carrying the mail, imprison the obscene author, and yet carry and distribute his filthy goods? And shall we hold to such a narrow construction of the Federal powers as will make the states and the United States thus play at cross-purposes? I think not.

By stuffing the mails with obscene matter, the service is made to *exceed and overdo* its proper office; to be harmful and a nuisance rather than a benefit to the people; and it seems hardly to be straining a point to hold that, by the delegation of power to Congress to make all laws necessary and proper to carry into effect the powers conferred in reference to the mails, authority is [illegible] to prevent as well the mischiefs of carrying obscene literature as those arising from mail robbery, so that the service should be protected as well from the dangers of *excessive*, as those of inadequate performance, and be not only useful, but harmless—at least to such extent as not to be accessory to crime. It is but a mode, in either case, of protecting its limited sovereignty, and discharging its office with integrity and decent dignity.

The case is widely different from that presented in the days of Jackson, when Congress was agitated by a proposal to exclude printed articles against slavery from the mails. Slavery is not sanctioned by the law of Nature, nor by the common law, and can only obtain by local and wrongful legislation. Being contrary to natural right, and offensive to the just sentiments of the civilized world, it was universally lawful, and even commendable, to write and speak against it.

The exception in a few Southern states, created by unjust legislation, could not render a dissertation against slavery, written and printed in a free country, unlawful in itself. If the paper were innocent in its inception, by the law of the place where it had its origin, it did not lose its character by being placed in the mails. And so it is evident that Congress

could not throw it out of the mails without trespassing on the right of property and abusing its power. The only act of repression could be done by the slave state after the mail service was completed. The paper was innocent when placed in the mails, innocent while being transported, and when delivered, and could only become offensive by force of a local law, operating on the person to whom the printed matter was addressed, *after* he had received it. No wonder that learned jurists and wise senators refrained from laying hands on such printed matter, and thrusting it out of the mails, as mentioned in the very able and ingenious argument of Mr. Wakeman, delivered at the late "Indignation Meeting" in Boston.

But the printed matter which I would exclude from the mails is unlawful in the place of its origin, unlawful during its transit, and unlawful at the place of its destination. Its preparation is a crime, its author a criminal, its possession and circulation a crime, in most, if not all, civilized countries, and wherever the common law prevails, or its spirit has been embodied in a statute; and if the carrier or distributor be a private person, he would be *particeps criminis* in judgment of law. And now shall we place the Federal Government in the same category?

This government assumes the burden of the mails; it may say when and where it will carry them, what it will carry, and *what it will not;* for it seems too clear for debate that a power to choose implies also a power to reject. And if there be a power to reject any printed matter—as I contend there is, if it be obscene and unlawful—an incidental power exists to make that rejection effectual. This is usually done by the infliction of pains and penalties; and in the infliction of these the government proceeds, not as against moral offenses, but offenses against the proper regulation of the mail service. I concede that any step beyond this would be pure usurpation and tyranny on the part of the Federal Government.

It is a business, this carrying of the mails, within the competency of private persons. Let us imagine our Uncle Sam carrying the mail-bag on his own broad shoulders, having told everybody what he would carry and what he would not, and a person should come and insist upon cramming his mail-bag with bad matter which the old gentleman had

sworn he would not carry, I think our uncle would make no bones of settling the matter off-hand, *pedibus et manibus*, to the utter discomfiture of the assailant; and he would serve him right. It would be a mode, according to the rhetoric of such cases, of "putting a head on him"—an article of furniture which he would seem greatly to need.

It is conceded that a single undivided sovereignty like the Government of Great Britain can exclude obscene literature from the mails by seizing the foul prints, and the infliction of pains and penalties. But it is claimed that in our distribution of powers between the states and the Federal Government this authority has not been conferred on the latter. Where, then, can it be found? If reserved to the states, or the people, it is clearly not available; for no state can touch the mail service without trenching on a power it has in general terms delegated to Congress; and no popular mass can meddle with the mails without being guilty of riot. So it is left that, if the Congress of the United States has not the power to exclude obscene prints from the mails, *this one item of sovereignty is lost*, and our government has tied its hands, so as to be at the mercy of those who deal in obscene literature as a profession and business. A construction of the Federal Constitution which leads to such a conclusion is surely too narrow to be sound.

Now to my mind there seems to be nothing in the way of protecting the mails from foul matter but the fear of violating the freedom of the press; and as I trust you are by this time satisfied that there ought to be no obstacle in that, we come to the inquiry, What is the Federal Government to do in reference to obscene prints?

In my judgment, Congress should declare that such prints are not mailable matter; but in doing so should employ the word "obscene" only, following the language of the provision in the code of Mr. Livingston as to the corruption of youth; being exceedingly particular, so that no religious fanatic or visionary moralist could find a word or clause on which to base a persecution of anybody for God's sake!

A God of ordinary ability is supposed to be capable of taking excellent care of himself, and to scorn the assistance of a creature but imperfectly developed from the ape.

The law should then affix such a penalty as would be sufficient to deter people from mailing obscene publications, and

no more; for the object is not to make a moral code, nor a penal code, nor enforce a creed, nor build up a catechism, but simply to protect the government in the fit and proper discharge of its function as mail carrier.

A fine of a moderate sum for the first offense would be sufficient, say not exceeding fifty or a hundred dollars; and for the second offense, imprisonment not exceeding six months. In all cases where punishment and penalties are inflicted, the legislature should be careful to observe the supreme law, which ordains that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

If the Government should find it necessary to go further, and to seize the foul matter mailed (a delicate procedure, and one which nothing but necessity can warrant), it would encounter a provision in the Constitution securing the people against unreasonable searches and seizures, and forbidding warrants for that purpose except upon probable cause, and supported by oath. The people are not secure from *all* searches, but only from unreasonable ones, without probable cause and legal warrant.

So used are the people to this, that the first thing a plain man thinks of when he loses anything mysteriously is a search warrant. It is the one idea with him, as was an "alibi" in every case at law with Tony, the venerable parent of Sam Weller.

It may be a very difficult process, but it can hardly be deemed "unreasonable," to search for and to seize prints whose aim is to corrupt youth, whose existence is a crime, and which are forced into the mails against the express injunction of the law. I will leave this to the mothers of the land: they hav a right to be heard on this subject, and to hav their feelings respected by the laws. Let their quick sense of fitness, their apt and delicate judgment, make the decision, and woe to that man and that nation that ventures to disregard it!

But if the Government shall be compelled by the persistence of wrong doers to seize the foul prints, how shall this be done? The only course which occurs to my mind, from what reflection I hav been able to bestow on the subject, would be to commit the search to the several deputy postmasters, who should apply to a United States commissioner or judge for a warrant, and under that to seize the suspected

prints, and carry them before the officer issuing the warrant, who should determine on reading or inspection whether obscene, and tending to corrupt the morals of youth, or not. If he held them obscene, the owner should have notice and a right of appeal to the Circuit Court, and thence to the Supreme Court of the United States; for no man should be thus deprived of his property, and stigmatized as a public offender, without the full benefit of a judicial trial.

It is better that obscene literature should prevail for a season than that any man, however humble, however depraved, should be deprived of his legal rights without due process and the enlightened judgment of the law.

Brethren of the National Liberal League, you are organized to perform a necessary and a noble work—no less than that of perfecting our system of free government, founded by a wise and virtuous generation, and intended to effect a perfect separation of the Church from the State. The task which you have assumed to execute is herculean, taxing your strength and resources to the utmost. You have to make war on the myths, traditions, and prejudices of long ages. You have a thoroughly organized majority, misled by their spiritual guides, to contend against—a majority which, though differing in many things, and forever disputing among themselves, nevertheless is always ready to unite against *you*, as a common enemy; and you see Catholic and Protestant hugging each other in sweet embrace, as of late in New Haven, while maintaining the Bible, prayer, and psalmody in the common schools. If all the discordant religious sects could unite, they would paralyze your efforts, render the idea of a purely secular government infamous, and make religion the parent and master of the state. The plan of our forefathers would be stamped out, and time might restore that grand Christian invention, the Inquisition.

Be sure, then, that you do nothing to unite and consolidate forces so dangerous to a free state. As yet you are not surrounded by such intelligence as will forgive your slightest mistake in reasoning, or error in morals. A believer can do with impunity what will excite the utmost horror if done by a skeptic. As such of you as have no Redeemer may not commit fraud nor forgery, nor rob a bank, nor poison, nor commit adultery with impunity, so you cannot commit

a mistake, even in respect of the liberty of unlicensed printing, without calling down on your heads and on your cause the loudest denunciations of the "unco guid." "Ah! ha!" would say those who pardon the offenses of the godly, "it is just as we expected. These Infidels oppose our holy religion from no other motive than to get rid of the moral restraints which it imposes; for you see that where two or three of them are gathered together, they incontinently betake themselves to reading and circulating the 'Fruits of Philosophy' and 'Cupid's Yokes.'" And all the congregation would lift up their pious voices, and exclaim in the language of the immortal Widow Bedott, "O Elder Sniffles, how true that is!"

I entreat you, therefore, to be wise; and being in fact the true friends of morality and enlightened freedom, that you take no such position on the subject of the freedom of the press as will enable even a Jesuit to argue that you are the friends of licentiousness.

Above all things, reverence the family as founded in Nature, and tolerate nothing which can corrupt the morals of youth. All power, even the most salutary, is capable of being abused; but an argument based on its abuses cannot overthrow the power itself. If otherwise, no government could stand. Let imperfect laws be amended; let unjust ones be abolished; let abuses in administration be corrected; and when government appoints to office one who, like Satan, becomes

"The tempter ere the accuser of mankind,"

a spy whose moral qualities fall below the requirements of even that mean office, let *him*, but not the government, be abolished.

Judge Hurlbut then read the following draft of a United States statute on this subject:

A LAW TO PREVENT THE FORWARDING AND DISTRIBUTION OF OBSCENE LITERATURE BY THE MAILS.

SECT. I. *Be it enacted, etc.*

That there shall not be forwarded by the mails, nor distributed by any deputy post-master, any obscene print, picture, drawing, or printed composition, manifestly designed, or mainly tending, to corrupt the morals of youth.

SECT. II. If any person shall deliver at any post-office, with intent to hav forwarded, or distributed, any obscene print, picture, drawing, or printed composition, mentioned in the preceding section, he shall be fined for the first offense, not exceeding ——dollars, and for the second or any subsequent offense shall be imprisoned not exceeding ——months.

Provided, however, that no printed book, argument, essay, treatise, or disquisition, put forth in sincerity and good faith, and in which no obscene words, phrases, or pictures shall be employed, although its doctrines or sentiments, if carried into practice, would have a bad influence on society or government, shall be deemed obscene within the meaning of this law.

REPLY BY THE EDITOR OF THE TRUTH SEEKER.

We are sure our readers will be glad that we hav reproduced from *The Index* the Hon. E. P. Hurlbut's able address upon this subject, given on the second and third pages of this issue. As an argument in favor of freedom of speech and freedom of the press it is sound and is on the side of American liberty. But inasmuch as it is regarded as the ablest argument that has been produced in favor of retaining the Comstock postal laws upon the statute books, and as —aside from the slanderous charges and reiterations that those in favor of the repeal of those laws are vile abettors of immorality and indecency—it is about the only argument that has been advanced by the "high moral" party, it is to be regretted that it is not clear on the point as to where the United States obtains the anthority to take cognizance of the morality and opinions of the citizens of the various states. Here is where the Judge's paper fails to impart the information which thousands are so anxious to obtain, and very many will be sorry that he passed over this vital point so easily. And from this very fact we perceive the weakness of the position that such marplots as Anthony Comstock hav any rights under the General Government to impose upon the freedom of speech, the freedom of the press,

and the freedom of the mails. All who are desirous to learn how the United States Government obtains the right to inquire into the opinions and moral sentiments of the people of this country, and to employ its courts to convict and punish them therefor, will be disappointed in Judge Hurlbut's address.

So far as he quotes that eminent jurist, Edward Livingston, in framing the criminal code of Louisiana, it is all right. Every Liberal in the country will admit that Livingston was correct in his definition of obscenity, and that the penalties under the state law which he named were just and reasonable. It is under state laws that obscenity is a crime and should be punished. But the judge quotes nothing from Livingston or any other jurist in favor of the General Government's taking cognizance of obscenity or punishing it. Here is just the point of difference between the "high moral" party and those they characterize as low, vile, and indecent—the one holding that the General Government has the right to inquire who is obscene, and to punish them with severity, while the other insists that the General Goverment has nothing to do with it, but that it belongs exclusively to the states as Livingston proposed. As this is the ground upon which the Liberals of the country are divided, and as it was upon this point that the National Liberal League disagreed, we can but be sorry that the Judge had so little to say about it. He did not quote any jurist or any authority whatever in favor of the General Government's taking the obscenity business from the hands of the states, where it justly belongs. The Judge hits the matter squarely on the head when he says: "The states and not the Federal Government hav the power to punish abuses." This is emphatically the doctrine of the hated Repealers, and if the holding of it makes them amenable to the charge of immorality, vileness, and indecency it ought to apply to the Judge as well. If it is indecent for them to deny the powers of the Federal Government in cases of freedom and censorship, the Judge is also indecent.

The Judge certainly does not make a strong argument when he undertakes to show that the Federal Government possesses the power of inquisitorial jurisdiction over the moral quality of the mails. He very correctly states that the power conferred upon Congress by the Constitution to

establish post-offices and post-roads confers also the implied power to punish robbery and other offenses against the mails which hinder and obstruct the postal service, which power is strictly for postal purposes. He distinctly says of the General Government that "when it punishes a robbery, or other offense against the mails, it is not for a general correction of the public morals, or of enforcing any of the Ten Commandments, but to enable it to succeed in safely delivering the mails." But this is no argument in favor of inquiring into the opinions or morals of those who deposit matter in the mails, and there is no sort of analogy between the two cases. The first is to facilitate the transmission of the mails by removing obstructions, while the other throws obstructions in the way of such transmission by holding the mail matter until it is examined and then throwing it out if found to be of an immoral character, or what a fallible or bigoted man would consider immoral. Punishing mail robbers bears no similarity to questioning the opinions and morals of those using the mails. How the mail robbers give the Government the power to be a moral inquisitor we fail to see.

The Judge seems to favor a somewhat moderate method of procedure, when he says: "The law should affix such a penalty as would be sufficient to deter people from mailing obscene publications, and no more; for the object is not to make a moral code, nor a penal code, nor enforce a creed, nor build up a catechism, but simply to protect the Government in the fit and proper discharge of its function as mail carrier." But why the Government, in order to protect itself in the capacity of mail carrier, should find it necessary to examine into the moral character of the mail matter intrusted to it is not made clear.

But further on, the Judge makes the proposition for a system of censorship and espionage which to us seems the most monstrous and most destructive of the freedom of the press and of personal rights of anything that has been yet proposed. He says: "The only course which occurs to my mind, from what reflection I have been able to bestow on the subject, would be to commit the search to the several deputy-postmasters, who shall apply to a United States Commissioner or Judge for a warrant, and under that to seize the suspected prints and carry them before the offi-

cer issuing the warrant, who should determine on reading or inspection whether obscene and tending to corrupt the morals of youth or not" Now is that a practicable process for a Judge to propose? How are the postmasters to smell out each one mail matter except they open it and examine it, and, Paul Pry like, look over what the people send out? It could only be done by establishing a system of espionage the most repugnant ever known in the world! And then when the deputies or clerks think they have found something that is not quite correct or that might tend to corrupt the morals of youth, they must go to a commissioner or judge for a warrant, when the suspected matter must be taken before said commissioner or judge, who must read it over and see whether it really is improper to be sent forward, or whether it must be detained and the mailer punished by a suit in the courts of the United States, and this Judge Hurlbut calls facilitating the mail service, and advocates it upon the grounds that mail robbers are punished! This is represented as a powerful and unanswerable argument in favor of the Comstock postal laws, to oppose which is to be denounced by the immaculate "reformers," as vile and obscene.

If the post-office in this city be taken as one most necessary to be inspected and scrutinized for indecent matter, where at least a hundred tons of mail matter leave daily, a full regiment of deputies or inquisitors would be required to ferret out the immoral matter that might be mailed; and if such quantities are constantly being sent to schools and seminaries as Comstock and Abbot assure us are being sent, it would require a great number of commissioners or judges to issue warrants and bring to justice the vile offenders. It would make such an inquisition of the general post-office and United States courts as would put Dominic and Torquemada to shame. It cannot be believed that the American people are yet ready for a censorship of this kind, and it can hardly be believed that the intelligent Liberals of the country are prepared to accept a system of espionage of that sort, or that it is needful to uphold such a rule in order not to be denominated Freelovers, defenders of obscenity, etc. Far sooner would we indorse what the Judge utters when he says: "It is better that obscene literature should prevail for a season than that any man, however

humble, however depraved, should be deprived of his legal rights, without due process and the enlightened judgment of the law." That sounds far better than proposing the odious system of inquisition we hav briefly considered.

He states a potent truth when he says: "A believer can do with impunity what will excite the utmost horror if done by a skeptic. As such of you as hav no Redeemer may not commit fraud or forgery, nor rob a bank, nor poison, nor commit adultery with impunity, so you cannot commit a mistake, even in respect of unlicensed printing, without calling down on your heads and on your cause the loudest denunciations of the 'unco guid.'" This is particularly true, but it seems a very indifferent argument to convince Liberals why they should advocate throwing away the guarantees of the Constitution, which is the only protection we hav for the liberties of the people, and advocating a censorship and an inimical tribunal which will judge skeptics and Freethinkers far more severely than believers and favored ones and pronounce them guilty of sending obscene matter when in others it would not be noticed. If that is a good reason why unbelievers should shout themselves hoarse in favor of Comstockism we fail to see it.

Rather than to advocate this tyrannous and unfriendly rule, we insist it would be far better to punish obscenity by such state laws as Edward Livingston devised for Louisiana and similar to those which every state has in its criminal code. The state laws are amply sufficient for almost all cases of obscenity, and it is certainly better to giv them a fair trial before making a detective spy system of the post-office department. The aphorism which the Judge quotes from Blackstone is worthy of repetition. "The liberty of the press is indeed essential to the nature of a free state. . . . Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this is to destroy the freedom of the press." In the same connection we will also quote a worthy sentiment from Chas. A. Dana: "Liberty cannot be overthrown in this country by direct attacks. The only danger is that it may be insidiously undermined." It is in yielding assent to the plausible doctrines advanced by Judge Hurlbut, and more urgently demanded by Anthony Comstock and Francis E. Abbot, that Liberty's greatest danger lies.

THE CAMPAIGN AGAINST UNCONSTITUTIONAL POSTAL LAWS AND ESPIONAGE OVER THE MAILS.

A REPLY TO SOME PARTS OF THE ADDRESS OF HON. E. P. HURLBUT OF ALBANY (FORMERLY JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK) ON "THE LIBERTY OF PRINTING," DELIVERED BY HIM BEFORE THE SECOND ANNUAL CONGRESS OF THE NATIONAL LIBERAL LEAGUE, HELD AT SYRACUSE, OCT. 26TH AND 27TH, 1878.

To the Editor of the Index: Wit and age combined are so pleasant that it is an unpleasant duty to question their gifts. In this view I have some sympathy with the minority whose "*fillibustering*" prevented me from replying to Judge Hurlbut's address on the day it was delivered. Since then a similar feeling of reluctance to appear publicly in opposition to our venerable friend, added to my repugnance to the whole subject, has even given a hue of pleasure to the engagements that have kept my pen from paper. Indeed, if you had not put out that address in pamphlet form as "*proving unanswerably* the constitutional right of Congress to prohibit the circulation of obscene literature through the mails"—a claim the Judge never made for it—I should have left it to the second thought of the readers to furnish the answers that seemed to the majority of those who heard it ready enough, for its effect was to largely increase the vote of that majority.

But fortunately the dissent of those who favored the repeal of espionage was largely balanced by their delight at the first half of the address, which was really *in favor of* "*liberty of printing*," and which seemed to them a substantial answer to the latter half of the address *against it.* In clear, sententious utterances the Judge echoed the feelings of all Liberals, and I hope all Americans, as to the priceless value of the liberty of printing, including, of course, the circulation of printed matter. To that he rightly attributes "the downfall of ignorant authority, the abolition of slavery, the general progress of the world," and adds these memorable words: "*Without the liberty of printing a democratic republic cannot exist; a plea for the former is a plea for its life.*"

These are our common premises. Do they lead to his conclusion, or to mine? Do they lead to *an espionage* over the mails or to *their inviolability* under the Constitution?

At the outset, let every intelligent reader be admonished that though this may be a question of constitutional law to some extent, he is not to give up his right of private judgment and submit to lawyers or courts. The Constitution was made for the whole people to understand, and they are to determine what it means. There is always an appeal to them just as in Parliamentary law there is always a final appeal to the House. Intricate questions of real estate, commercial law, or private rights are generally left to a Court's control. But questions of public liberty and of government, although always in this country questions of constitutional construction, are determined by *the people.* They

must, therefore, take care to understand the fundamental law of the land, and never commit its meaning to any learned profession, departments, or Courts. For the lawyers, like the Judge and myself, will disagree; the departments, as in the case of these postal laws, will seek to use "ulterior powers;" the Courts, and especially the Supreme Court of the United States, will too often be found on the wrong side of any question of liberty. This was abundantly shown by the instances cited in my Faneuil Hall speech. In every case there cited the people reversed the courts by *repealing* the laws. By the quiet and efficient use of vote, voice, and influence the people can in that way always protect themselves and preserve their liberty and the Constitution. The position now is very similar to what it was when the Dred Scott decision nationalizing slavery was rendered. It did not take liberty-loving citizens then very long to discover their true path out of the mazy tangles of law arguments. They knew by instinct that the Federal Government was never intended or formed to protect slavery, and as soon as their attention can now be clearly called to it, they will know that it was not intended nor formed to be an Inquisition over the mails, the press, and the people, by its post-office.

Another matter preliminary and necessary, is that the reader should become familiar with the great and constitutional distinction between the powers and functions of the state governments and the Federal or National Government, especially in regard to criminal jurisdiction. To this end, I will suppose the reader to have read my Faneuil Hall speech and Answer to *Index* criticisms on the same. As the

address of Judge Hurlbut was to some extent intended as an answer to those publications, a knowledge of them is certainly necessary to the understanding of this discussion.

We come now to the main question, and in the end we think it will be found to amount to this:

Shall the United States or General Government acquire a *new* and *unlimited* criminal jurisdiction over the lives, liberty, and property of the people by means of a discrimination in regard to the meaning and sentiments of postal matter, not required for postal purposes, and enforce it by an espionage and penalties not required for postal protection?

The Judge may not intend this, but it will be found that the construction he contends for implies it, and makes it the real question.

We say this is a *new* claim. For one hundred years the simple grant of postal powers in the Constitution, to wit, "To establish post-offices and post-roads," was held in law and practice to mean that the United States, through their Congress, had power to run and regulate "*the entire postal system of the country*" *for postal purposes;* but not for moral, religious, political, or any ulterior purposes.

We say also, that this is a claim for *unlimited* power. There is no limit to the use of the precedent it establishes. These postal laws began in 1872 by excluding all lottery matter from the mails, then in 1873 matter that might be deemed *obscene, immoral*, etc., was excluded, and this kind of legislation has been extended in 1876, as will appear from all the laws on the subject hereto annexed. This legislation is intended for no postal purposes, but as expressly stated by the Supreme Court in the Jac-

son case, to suppress "matter deemed injurious to public morals," and "institutions which are supposed to have a demoralizing influence upon the people." If such "matter" and "institutions" can be constitutionally discriminated against in the mails, so can any other matter or institutions which the whim of a Congressional majority may wish to destroy. Similar laws will, when the necessity is deemed sufficiently pressing, certainly be enacted against blasphemous, irreligious, revolutionary, socialistic, riotous, incendiary, or insurrectionary, etc., etc., matter and institutions. If this power is once granted, the majority are in duty bound "to protect the people" in every way by it. The post-office is a necessity of every civilized person, and the minority are at their mercy. The Constitution, as the bulwark of the liberties of the states and the people, will be practically swept away.

To argue for this new unlimited power before a meeting of American citizens, and above all, *Liberals*, ought to have been like arguing for the Dred Scott decision in a Republican Convention, and it was no wonder I had to thank the Judge for increasing the majority for "repeal."

The Judge thinks that Congress has this power under the Constitution, and that it may be executed with safety to liberty.

I think that the Constitution grants no such power, and that it is a usurpation most dangerous to liberty. We must then, first in order, look at this question of alleged constitutional power, and then consider its dangerous consequences to liberty. The Judge has chosen to consider the consequences first. This is often done where the conclusion is felt rather to jus-

tify the premises instead of following from them, and should always lead us to suspect their soundness. But many are willing to help row the boat if they believe it carries their treasure. To put the part of the address relating to this supposed United States power logically, we must read its paragraphs in their inverted order, and begin with his proofs of the existence of this power near the middle of the second half of his address. We will review his reasons in that inverse order and close with his attempt to harmonize this supposed power with liberty and the freedom of the press.

I. The first ground assigned for this power is evidently his main reliance, and may be called the argument of *lost sovereignty*.

It is well known that this power of espionage has been used in all despotic and monarchical governments, and even to some extent in England, whence our law and government were derived. It is conceded that the government in those countries does inspect the mails and use them as a means for the detection of criminals. This is now done constantly in Russia, as I have good reason to know from letters lately received from there. Thus, throughout Europe the post-offices are regular traps to catch political and social, as well as moral and criminal, offenders. Thus the real purpose of the post-office has been prostituted for purposes of oppression and extortion, or the banishment of every opponent of tyranny and despotism.

Now, says the Judge, this attribute of sovereignty, having once belonged to our people, as it did to the English people and *their* government, must now be lodged either in our state or national governments

for it cannot have been lost. But the states have it not, for they can do nothing *inside* the post-offices; therefore the General Government must have it!

The answers to this are plain enough:

(1.) It is an amusing instance of what logicians call the fallacy of "proving too much," which as we shall find is a constant attendant upon the Judge throughout his treatment of this question of power. If this "item of sovereignty" has been inherited or possessed by our state or national governments, so have all the other abuses or "items of sovereignty," to which we have referred, and the state and national governments are very derelict in not exercising them for "the good of the people." Nor is this "item" limited to obscenity, but it must include all other purposes for which the English Government has used it.

(2.) The next and conclusive answer is the fact that our people, out of their unlimited and absolute sovereignty, have chosen to establish a limited Federal Government, and have also limited the sovereignty of the state governments by constitutions, and in so doing, have determined not to use thousands of "items of sovereignty" that they might have used, and which other "undivided sovereignties" do use.

They might have formed an empire like Russia, or a limited monarchy like England, and in such cases would have exercised all of the "items of sovereignty" suitable to those Governments. But in forming a Federal Government "to secure the blessings of liberty to ourselves and our posterity," they laid aside many "items of sovereignty" exercised by other peoples and governments, but deemed by

them "dangerous to public and private liberty and utterly inconsistent with the genius of free institutions," as the Liberal League stated it at Philadelphia in 1876. The people may, out of their absolute sovereignty amend or lay aside our present Constitution and return to the forms and "items of sovereignty," called a despotism, but until they do this such possible items of sovereignty not granted by the Constitution to the General Government remain in the states and people, not *lost* at all, but in disuse until they choose to change our present constitutions, national and state.

(3.) That this inspection and espionage of postal matter was one of those "items of sovereignty" our republican fathers were expressly anxious to get rid of, is clear enough from contemporaneous history; from their declaration that the postal power was to be "*harmless in every point of view;*" and, also, from the express and limited grant "to ESTABLISH post-offices and post-roads," *with no general power over them otherwise*, much less, power to use them for governmental or any ulterior powers. A little attention to this latter point may be needed. The grant of postal power is for a postal purpose as plain as words can make it. The words do not intrust the general power to Congress to make general laws on the subject, as Parliament might do, or as Congress might do in regard to foreign commerce, coinage, weights and measures, patents, bankruptcy, copyrights, piracies, or offenses against the laws of nations. Over all these subjects Congress has jurisdiction by a general grant of power, but the postal power is simply to "*establish*," *i.e.*, to do a

specific thing for its own sake and purpose, and no more!

This special limitation was necessary to render the power "*harmless*," and free from usurped criminal jurisdiction and espionage. The British Government had intercepted and broken open letters and papers for every reason that seemed to them good. The inviolability of the mails was an instinct of republicanism, while espionage is the necessity of all spiritual and political despotisms. Our fathers were expressly careful not to grant this latter power, so liable to abuse, and so completely at war with the sentiments of the American people. They determined to bury this "item" with its brother items of tyranny, beyond the power of resurrection, and so they gave a special power that had been used under the confederacy (without thought of espionage) and merely added "and post-roads" to the former power of the confederacy "to establish post-offices." The post-office was thereby for the first time emancipated, and, in America, its contents were no longer to be under the espionage, interception, and violation, as if in a detective bureau, of the government. Our Fathers, when they snatched the scepter from tyrants, took with it that "item of sovereignty," post-office espionage. It is clear that this power was not granted by the United States Constitution in words or intention, and that to imply it as an "*item of sovereignty*" would bring on us all the "items" we had a revolution to get rid of.

II. The next ground the Judge takes is stated in these words: "For it seems too clear for debate that a power to choose implies also the power to reject," and to enforce the rejection by penalties.

This is nothing more than the old argument of Mr. Justice Field, and which was completely answered in my Faneuil Hall speech. Instead of being too clear for debate, it is so manifest a begging of the question that it is ridiculous to argue it seriously. The power to exclude has *ever* been for postal purposes, and this fact entirely negatives the notion that exclusion for any other purpose is lawful. To assume that there is a *general* right of exclusion because there is a right to do it for *postal* purposes is simply absurd, and assumes what is to be proved.

But the Judge's humor comes to the relief of his logic. He represents "Uncle Samuel" as a *personal* mail-carrier, who, "having said what he would carry and what he would not," puts "a head" on any one who puts stuff he thinks "dirty" in meaning in his mail-bag.

But Uncle Samuel, by permanent and unchangeable contract to the exclusion of all others, went into the mail-carrying business simply *as such* and for his employers in common. He worked a hundred years without regard to the *sentiments* of the *inclosed* matter his employers sent. Now certain fanatics tell him there may be some lottery matter in his bags, or papers "dirty" in meaning. He thereupon begins to dictate to his employers as to what he will take, and instead of delivering his letters and papers he sits down by the road and tries, in a blundering way, (for he has more good nature than critical judgment,) to spell out the lottery matter and dirty papers and destroy them, and then to find out and punish the senders! Unless his employers are fools they will put "a head" on Uncle Samuel that will enable him to

attend to *his* business and fulfil his contract of mail-carrying better than this. A private mail-carrier would soon find his head broken after such antics.

But the Judge concedes that, after all, Uncle Samuel has no right to destroy this dirty matter or reject it on *moral* grounds. He says that the penalties to enforce this right of rejection can only be "not as against moral offenses, but offenses against the proper regulations of the mail service. I concede that any step beyond this would be pure usurpation and tyranny on the part of the Federal Government." This is an inevitable, but a fatal, admission.

It is only as against *postal offenses*, after all, that the Judge finds any right to reject any printed matter or to impose penalties for sending it. He is thus compelled to give up the right *wholly* or to assert that *moral* purposes are *postal* purposes.

III. The Judge therefore undertakes to show that moral purposes are, or may, or ought to be, in some way or to some extent, postal purposes. In other words, that Uncle Samuel, simply *as mail-carrier, and nothing more*, has a right, *under the Constitution*, to search for and throw out of the mails, and to punish those who send, matter he deems obscene, immoral, or criminal.

That moral purposes are not postal purposes was pointed out at length in my Faneuil Hall speech and answer to *Index* criticisms. It was shown that all attempts to exclude matter by inspection of its meaning, and to punish crimes by espionage and decoy, could only detract from the use, income, and "convenience" of the postal service as such; and that no justification was possible for such practices

unless the post-office could be used for the "ulterior purpose" of supervising the morals of the people and detecting criminals, purposes, in the words of Daniel Webster, "expressly unconstitutional." Now what are these offenses? and where is the right to impose any penalty for them found? It is a well-known rule of law that no penalty can be imposed by implication, and that there can be no penalty created without express authority.

The Judge answers none of these arguments—as, indeed, who can?—but he endeavors to push them out of sight by suggesting new aspects, which the slightest examination shows to be illusory and guilty of including and "proving too much."

1. The first of these suggestions is, that unless the mail-carrier looks over and throws out, and punishes the sender of, bad and criminal postal matter, he is *particeps criminis* in its consequences.

The answer is that the mail-carrier does not undertake to be responsible for the character of the mail matter, and without assuming a responsibility he can in no wise be guilty of a wrong. It is only his contract and duty to carry the mails, not to supervise their contents. He has no knowledge or intention that makes him share the criminal character or purpose of the matter enclosed any more than the captain of a vessel who carries it.

The argument to the contrary proves too much. If the duty of supervision exists, it must be thoroughly performed, or the moral responsibility will certainly attach. Letters and matter of all kinds must be then thoroughly inspected. It will never do to let rascals get ahead of the Paternal Government by a little mucilage, sealing-wax, or string.

Everything must come open, so that the people may be as thoroughly protected from any "improper" and impious influences as they are in Russia, or the government will certainly be morally responsible and *particeps criminis.*

2. The Judge next argues that obscene matter may be excluded for this reason, that "By stuffing the mails with obscene matter, the [postal] service is made to *exceed and overdo* its proper office; to be harmful and a nuisance, rather than a benefit, to the public; and it seems hardly to be straining a point to hold that, by the delegation of power to Congress to make all laws necessary and proper to carry into effect the powers conferred in reference to the mails, authority is derived to prevent as well the mischiefs of carrying obscene literature as those arising from mail robbery, so that the service should be protected as well from the dangers of *excessive*, as those of inadequate performance, and be not only useful, but harmless, at least to such extent as not to be accessory to crime. It is a mode, in either case, of protecting its limited sovereignty and discharging its office with integrity and decent dignity."

I quote the Judge's words in full on this point because they fill me with wonder and astonishment, as things *mysterious* are apt to do; and because the Judge, at Syracuse, seemed "to set special store" by this argument as one that might hold; and because it seems to me that the non-lucidity of the style is a picture of the same kind of thought. The Judge, usually so admirably clear and concise in his expression, would never have left us this sentence unless he had been severely tangled up by a notion

that would not stand simple and clear expression without vanishing.

When analyzed, this argument of *excessive performance*, (1) begs the question, (2) confounds things that have no relation to each other, and (3) "proves too much."

The reasoning is, that because the postal service has constitutional power to protect itself from inadequate performance of its office, caused, for instance, by mail-robbery, therefore it must also have power to protect itself from the excessive performance of its service, which the carrying of obscene literature would be.

(1.) But whether it would be an excessive performance of the postal service to carry what may be offered, not detrimental to itself, is a question that takes for granted the whole issue. We do not see how a postal duty can be *excessively* performed any more than any other duty. It cannot be *excessive* if the matter is constitutionally mailable, and that is the very question.

(2.) But whether the performance would be *excessive* or not, can in no wise be proved, because the postal service has the power to punish *mail robbery*, which would be destructive to it. That is for a plain, necessary postal purpose, to wit, to prevent injury to itself. The bad effect that certain mailed matter may have upon the people is certainly not a similar postal injury, nor an injury to the people, which the post-office is responsible for, as it would be if it allowed its service to be destroyed by robbery ; for

(3.) This argument, if allowed, like the former one, proves too much. If the postal department is

to regard the carrying of criminal or "improper" matter as "an excessive performance" of its duty, then it is in duty bound to see to it that it carries no improper matter. It must protect itself from all "excessive performance" by making the national post-office a national sieve to cull out what it may deem to be non-injurious to the people; and it must destroy the rest, with penalties to the senders.

The Judge can never escape the fatal assumption that goes with every attempt to sustain any United States postal law of this kind, that is, that it must be executed by an espionage amounting to a censorship of all mailed matter. For the power and right claimed involves the moral duty of its use to protect the people against everything that may be criminal, immoral, or injurious. The new Inquisition has its moral responsibility, which, if it assumes, it must execute; and what, to use his own words, may not be "*accessory to crime*"?

(4.) The Judge next tries to show two further grounds for supposing that there may be an "excessive performance" of postal service, which the United States should be protected against by these new postal laws. These are:

(1.) From the nature of the postal grant: Because the people and states, by the Common Law or statutes, prohibited the circulation of certain matter, therefore they could not have granted to the General Government power to carry the same.

(2.) From comity: Because the laws and departments of the General Government were not designed to defeat or play at "cross purposes" with the state laws, and so to injure the people; *therefore* what the Common Law and states prohibited must have been

prohibited to the General Government, and it must protect its mails from such *excessive* performance in carrying things the Common Law and states have prohibited.

The answers to all this are simple and conclusive: (1.) The people and states who made the Constitution never, *in fact*, made any such distinction. There is no intimation that the post-office was to be used to carry "lawful matter;" and for a hundred years no such pretense has been thought of. Besides, we have shown, on the contrary, that the postal law is in the same words as under the confederacy, in which the General Government ran the post-offices without any such distinction. It was left entirely to the state laws to determine what matter should or should not be circulated by mail or otherwise. If this power of exclusion is a *postal* power, then it belongs exclusively to the General Government, and the states have, and have had, no right to punish for mailing anything, which is absurd.

(2.) This division of postal power and service into two kinds, *excessive* and *non-excessive*, according to state laws or the common law, would have been ridiculously impracticable, and is so now. Whenever any state or any number of states change their laws about lotteries, or obscene literature, or libels, or blasphemy, or any matter "accessory to crime," then it becomes an "excessive service" for the mails to carry such matter in those states. The United States laws are to be limited by the state laws; and what is lawful in the state where the mail is made up, must be lawful elsewhere and *vice versa*. But how is it that these very Comstock postal laws prohibit the mailing of lottery matter, which is perfectly inno-

cent at Common Law over the whole Union, including Kentucky and Louisiana, where lotteries are legal and the states often use them? What becomes of the excessive service in such case? But how can we be sure that every "deputy postmaster" will be accurately acquainted with the annually changing laws of *every state on every topic?* And if he is not, he will certainly be rendering *excessive* mail service in some of our forty states and territories, and the Government will be *particeps criminis* and "accessory to crime"! Need we say more?

(3.) In the Senate debate of 1836 on incendiary literature, this "comity" question was presented by Mr. Calhoun, not as involving an *excessive* postal performance, for he never suggested anything so ridiculous, but as a matter of Federal duty not to act at *cross purposes* with the states which, in his view, had only made the General Government, and which was therefore surely their ministrant. On this ground he claimed that incendiary literature should be non-mailable and non-deliverable on inspection by the deputy postmaster in states where it was prohibited by criminal laws. This was decidedly disallowed by the Senate, as without ground in fact, as wholly impracticable, and as involving the *espionage* of the mails.

But the Judge seeks to discriminate between mail matter that *he wishes* to repress and this anti-slavery matter, which he says was always innocent and mailable because it was so at *Common Law* and in the state where it originated. But this discrimination will not hold a moment. If the state laws have anything to do with the mails, "insurrectionary" matter became illegal just as soon as the mail passed

into a slave state, and should have been destroyed by the deputy postmaster of that state, unless according to the Judge's argument, the United States should be willing to be *particeps criminis* in the violation of the laws of that state by an *excessive use* of the postal power. How could there be a more flagrant instance of "excessive power" than in thus violating the comity of a state, and acting in direct cross purposes to its policy, safety, and criminal laws?

The *common-law* excuse mentioned by the Judge is but another instance of the utter futility of his distinction, for these very Comstock postal laws began in 1872 by excluding all *lottery matter* from the mails. There is certainly no common-law or postal reasons for excluding lottery matter any more than "religious" or any other matter. In what possible sense can the carrying of it be an "excessive postal service"? Lotteries were lawful at the Common Law, and in all of the states when the Constitution was adopted, and so remain in several of them, and in Kentucky and Louisiana they are specially legalized and used by those states. The postal laws in question declare all lottery matter non-mailable in *all* of the states, whether *legal* in them or not, and a penalty is created for doing an act legal under the law of the place of the contract. In view of these facts, it is evident the Judge's discriminations will not cover and are worthless even as excuses for this usurpation.

(4.) But the Judge seems to suppose that there must be some special constitutional magic in the "*Common Law.*" In the delivery of his address he stopped to remind his audience that they heard "nothing about the Common Law at Faneuil Hall," as though

that had been designedly avoided. It was not avoided, but was not mentioned because I supposed that people who knew their way to Faneuil Hall knew that the United States have no Common Law jurisdiction, and nothing to do with the punishment of common law offenses. It seemed to me therefore absurd to assume that any one would argue that because an offense is one at Common Law the United States could do *indirectly* what it had no power to do *directly*, that is, to erect the post-office into a criminal tribunal to detect and punish common-law offenses. No reasoning short of this can find any common-law excuse for these postal laws, and the proposition is too absurd to spend time upon. An indirect usurpation is the most unjustifiable, as well as the most dangerous possible.

But the Judge seems to infer that it is an "excessive service" for the postal department to be engaged in doing acts that are against the Common Law, and that carrying matter condemned by the common-law is of this character. This is (1) simply a confusion of a public service with a private crime, and (2) again, it "proves too much."

(1.) The act of *mailing* anything, whether obscene, blasphemous, or libelous, is not a common-law offense, although the *circulation* of obscene, blasphemous, and libelous matter is such an offense. This circulation may be made by express, railroad, boat, or mail, but no crime or offense attaches to the means of the conveyance, circulation, or even *publication*. It attaches only to the person or party who has the criminal intention, *i. e.*, to the sender at one end of the route, and to the receiver and distributor at the other. It is only these persons who have had

guilty intent that can be properly punished for any crime. The Common Law is ready for them in every state of the Union, and is fully sufficient. It only remains to those who would protect youth and the public purity to see that it is enforced, as we shall show when we come to that question.

But (2) the notion that the Common Law makes the postal service excessive or unlawful in some way, when possibly used as an instrument to aid in committing offenses, "proves too much" in three ways at least.

It may, nay, must be, applied to all matter that may be used for criminal purposes, especially *blasphemous* and *libelous* publications which are common-law offenses as much as the obscene. It cannot morally or consistently be limited to the latter only, for,

It makes the postal department morally liable for the innocence from crime of all mailed matter as far as the common law is concerned. If this liability exists it is a terrible responsibility which the National Government must exercise as thoroughly as possible, or be guilty of all of the crimes that its espionage might have prevented.

The "deputy postmasters" must be so educated in the large number of common-law offenses that they can unerringly detect and confiscate all matter committing or tending to commit such offenses!

Surely no rational reader will wish one to follow further an argument fraught with such absurdities.

5. We are led by the foregoing to another point which the Judge seems to think very terrible. If the National Government does not exclude from the

mails matter criminal at Common Law or by the statute laws of the several states, then it becomes not only *particeps criminis*, but actually makes *innocent*, matter which was criminal in its very inception. And this it cannot do; therefore, the matter remains criminal, and the National Government, having such matter in its exclusive possession and control, must destroy it, and punish the offender who placed it there.

The answer is very simple: The sender is guilty, and his matter criminal by virtue of the Common Law, or the state laws, but when the matter passes into the mails it passes from those laws into a power that has no Common Law, or state law, or general jurisdiction. It does not become innocent before the laws that made it criminal, but it confers no additional jurisdiction on the General Government to punish for those crimes. The post-office has no moral purpose or quality. It does not take a fee for carrying obscene or blasphemous literature, but simply for carrying so much mailable matter, without regard to the sentiments of that matter. It renders nothing innocent because it has no moral purpose or intention. It exists for the general "convenience" of the public, good, bad, and indifferent, and carries matter of the same quality. Suppose the Constitution had granted to Congress the power "to establish *railroads* between the states," would it have the right to discriminate between the sentiments of citizens as long as they were enclosed in decent clothes, paid their fare, and behaved just as well as other passengers? Would it make any difference whether the passenger was a republican or democrat or independent? whether he carried the Bible or

"Cupid's Yokes" concealed on his person? Suppose such a traveler should be a criminal at common and state law, suspected by the conductor to be fleeing from justice, or going to commit a crime, would it be the duty of the U. S. conductor to stop the train, search that passenger, and put him off the train, or arrest, or punish him? If he did not, would he, or the Goverment, be guilty, as *particeps criminis* of that crime, or of an "excessive performance" of railroad service? or of making the *criminal* passenger innocent? But this leads to the same list of absurdities we have noted under the last point, and certainly need not repeat again.

This concludes all the arguments the Judge has put forth on the question of the power of the General Government to enact espionage postal laws. May we not say that they are all useful as illustrations of the futility of the claim? No ingenuity, however great or original, can make twice two five.

IV. We now reach the practical application of this power, assuming it to exist, to the freedom of the press.

The Judge argues that this power of espionage would be no abridgment of freedom of the press, because such freedom at Common Law, as witness Blackstone, means only freedom from *previous censorship*. We are reminded "that every freeman has the undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." No further definition is needed for this question in hand, but it should not be granted that freedom of the press in America does not mean more than freedom from previous censorship,—freedom in fact from hundreds of

grounds of prosecution *after* publication authorized by the common and ecclesiastical laws of England. *There*, the freedom is also limited by the irresponsible will of Parliament; *here*, it is granted and to be sustained under *constitutions* guaranteeing the liberty of religious, political, moral, and even personal discussion, subject only to liability before a common-law jury for injury actually done thereby.

But there is no need of going beyond the above quoted definition of Blackstone to show that the power the Judge contends for is fatal to the freedom of the press in the very sense that he uses the term. Mr. Justice Field in his opinion on this subject in *Jackson's case* has answered the Judge conclusively. He says: "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. *Liberty of circulation is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.*"

As we showed in the Faneuil Hall speech, Mr. Justice Field drew exactly the wrong conclusion from these premises, but *they* are perfectly sound and dispose of the Judge's argument at once. The freedom of the mails is but a part of the freedom of publication, which is the meaning of the words "freedom of the press." Publication means unrestricted circulation. A partial limitation of that by espionage, destruction of matter, etc., is a "prior censorship" of the Press of the most certain and effectual kind, and now more so than ever, when the post-office is its indispensable instrument. Such postal laws take away "the undoubted right every

freeman has to lay what sentiments he pleases *before the public*," and to stand the consequences under the laws of the states. For, as the Judge truly remarks, "*The states, and not the Federal Government, have the power to punish abuses.*" Plainly, the offender is to answer before the common-law juries of the states for his abuses. The Constitution forbids Congress in any way from "abridging freedom of the press;" it does not in any way authorize Congress to punish abuses thereof. *To protect*, and not to judge, limit, or destroy is the Federal office in this matter. In view of this, how inconsistent is it to say that the Federal Government may, constitutionally, make publication practically impossible by its postal laws! Such censorship is a prohibition which prevents "the laying of sentiments before the public," which, in Blackstone's definition, is expressly "to destroy the freedom of the press."

The post-office is the life of the press; when you take away the freedom of the former, the latter falls with it. Liberty of printing is nothing, unless the printed matter can be freely circulated; and, as the Judge said at the outset, "without liberty of printing a democratic republic cannot exist. A plea for the former is a plea for its life." It is with deep regret that I find the Judge closing his public life with a plea which, it seems to me, these words condemn.

In England the incompatibility of the freedom of the press with post-office espionage has been more and more recognized in practice, and by laws required by popular sentiment.

In our country this whole espionage business was sought to be rendered impossible by the two most important features of our government.

1. The separation of the state and Federal Governments, and the committal of the post-offices to be "*established*" by the latter only.

2. The separation of the ecclesiastical and spiritual powers from the temporal governments, leaving the former to instruct, advise, and persuade, and the latter to act, judge, and punish.

(1.) We but echo the voice of the statesmen who framed the Constitution, who said that the "incidental" extension of Federal power and criminal jurisdiction would be the grave of American liberty. The laws in question are unmistakable instances of such extension. Not only was there no grant of it in the establishment of post-offices, but Jefferson and his compeers, after securing freedom of speech and the press, would never have been so foolish as to have left this power unrestricted if it had been even dreamed of. They would never have left open a power by which the press could be stricken down at will under the incidental prohibition and espionage power of Congress and the postmasters.

No better illustration of the danger of this power, even in its milder forms, could be found than the method of espionage and the congressional statute proposed by the Judge himself at the close of his address. Under them the postmasters are to search the mails and retain what they and a United States commissioner deem *objectionable* on the ground of obscenity, with trial *afterwards* before a United States court. The property is thus unconstitutionally condemned without trial, before it has reached the public at all, or done any injury, and by a tribunal practically secret, irresponsible, and foreign to the people. The supposed of-

ender, or at least his property, is destroyed by an Inquisition without ever having reached the constitutional judges—the public and a jury of his state and vicinage. This as the final result, is the freedom of the press, and all that the Judge would leave us of American liberty! If the post-office is, for any purpose or pretense however specious, allowed to become a United States criminal tribunal, its jurisdiction is unlimited, for it may judge of everything mailed, and so reach every man, woman, and child. It must also use *only* powers that belong to the Inquisition, secret examination, espionage, and decoy, for without *these* it can do nothing, and such postal laws cannot be executed. The United States jurisdiction, if once allowed, must and can only be exercised by means of a criminal procedure entirely foreign to our institutions, and which proves at once that this power to use them was never granted to, and must never be construed to be given to, the United States.

(2.) These postal laws are but another form of the re-union of church and state. They were obtained by the representatives of certain "religious" sects so as to give them, through their agents, the power of supervising public morals according to their views, and in their interest, by means of the temporal government and criminal prosecutions administered by their "agent." To this end the power of espionage and decoy were surreptitiously placed over the mails with terrible penalties, which have nothing to do with postal purposes or the post-office whatever. The Comstock laws of the state of New York have been brought to sustain these national laws by statutes establishing a Society for the Sup-

pression of Vice—practically under theological influences—to work them, to give half of the fines to their agent, and to even authorize arrest without warrant.

The success of this ecclesiastical attempt at temporal government has brought into play another "Society for the Suppression of Crime" with a distinguished clergyman at its head, who is actively engaged in disciplining our state Governor and Courts. Besides these two flourishing specialties of spiritual power, we have many other societies for this and that "good object," backed by state laws specially obtained to help the clerical influences to make and administer the laws of *this world* instead of looking after the next.

Our temporal common law government is pretty well abdicated. Its duty of *administering* to the common temporal wants and necessities of the people is delegated to corporations and monopolies, who tax and fleece the people without mercy. The duty of *protecting* the people by administering the common criminal law through the municipal police, District Attorneys, and Grand Juries, preparatory to action by courts, is handed over to these amateur societies, half theological and half criminal.

This whole method of legislation is contrary to our institutions, ineffectual and disgusting. No power in a democratic republic should execute the criminal laws except officers thereof responsible to the people. These special agents are responsible to no one but the church influences which appoint and sustain them. They are simply the reappearance of the Christian Inquisition.

Again, this method of administering criminal law

is ineffectual. It lives by torturing and scotching the snakes of vice and crime, but never killing them. This espionage-detective system is the nursery of the crime upon which it feeds. The crime is the stock upon which the amateur official makes a "raid" from time to time to keep him in salary and fame, but which he would really no more destroy than the poultryman would kill off all of his stock at once. Besides this reason, these espionage postal laws can never, from their very nature, be sufficient or effective. The only way is to break up the manufacturies and fountains of the mischief under the state laws and by their officers, as was done and can readily be done again. Let this whole business of private and sectarian detective criminal prosecution be abolished, and then the police and prosecuting officers can, by the press and people, be made to see and feel the responsibility that officially rests upon them, to enforce the laws *effectively* and *impartially*.

Is it not mortifying if not disgusting, after a hundred years of trial, to see our post-office and state criminal laws handed over to an Inquisition and societies of this kind? But when we find the leaders of a League expressly formed "to separate church and state" joining in the effort to render this Inquisition *constitutional*, what words ought to express our feelings!

V. This brings us to consider the motives that lead some Liberals to try to make out this power to be constitutional. These motives are a desire to protect public decency and the morals of youth. I yield to no one in my desire to accomplish these objects, but I know they cannot be effected by the lawlessness of usurpation, or the sentimentalism that is regard-

less of consequences. From the Judge's proposed *state* law on this subject I dissent, chiefly because it is an attempt to supplant the Common Law which prevails in all the states except Louisiana, for which state Mr. Livingston's code was proposed, but never adopted. The section which the Judge wishes to revive from that code omits the important point of protecting the general public, as well as youth from offenses against pudicity and decency. This is an important element in the common-law offense known as the circulation of obscenity, and it is one I am unwilling to omit. The privacy and sacredness of the human form and its physical offices are protected at Common Law, and all pictures or descriptions of them really obscene are contraband. My views on this subject were expressed in the seventh resolution at the Liberal Convention at Watkins last summer, and I have never since seen reason to change them. It will be observed that they are much stronger than the Judge's proposal, but they only embody the letter and spirit of the Common Law, which needs no legislation or societies or postal laws or agents to accomplish more than they can do:

"7. *Resolved*, That we regard the power to suppress obscenity and indecency to be one of those powers reserved in the U. S. Constitution to the people and the states, and that it should be exercised by them, not by the passage of laws surreptitiously for religious sects and partisans, but by laws [if any are needed] passed under general consent and after public notice, and which can apply only to unequivocal and well-defined cases; that we regard the true cure for obscenity and all danger therefrom to be the care of children by their parents and guar-

dians, and their truthful education, at the proper age, as to the nature and duties of the sexual relations ; that profanity, obscenity, and debauchery are the sure results of retrograde and repressive theologies ; that the Liberal cause is the cause of knowledge, liberty, and purity, which are the best guarantees of each other, and that this Convention hereby emphatically puts itself upon record as in no sense sympathizing with, but as holding in severe reprobation, those who seek, by the circulation through the mails or otherwise of literature of an obscene spirit and character, to corrupt, debauch, and inflame the public, and especially youthful minds ; and it hereby declares its emphatic approval of the use of all such means as may be within the legitimate scope of the government to secure the repression both of the issue and circulation of such matter by the press."

After careful examination I find that the Common Law in force in every state and territory, except Louisiana, is fully sufficient to effect all that can be reasonably desired on this subject. It can be enforced in any state or at any point from whence the evil is sent, and is a perfect answer to the demands of the friends of purity. Statutes and definitions on this subject are, as Livingston says, often worse than the offenses themselves. The wisdom of ages embodied in the Common Law does not undertake to define obscenity, but when the case arises its officers send it before the judge and jury of the vicinage who dispose of it so as to protect the public and youth. The repeal of all statutes national and state on this subject would be a return to common sense and Common Law in every way desir-

able. The Judge has done no more important service than in fostering the spirit of reliance upon the Common Law instead of artificial statutes and societies. It would be well not to set it aside even for Livingston. Let the reader make its acquaintance in the "Hand Books on Criminal Law," by Bishop or Wharton, and he will be surprised at its simplicity and wisdom. The penalties should be modified to the age in which we live; all that has been foisted into it by religious zealots in their efforts to make Christianity a part of it should be removed as foreign, and then I know of no better or safer criminal code.

Instead of yielding to the Judge on the Common Law I will imitate him, and apply to it the "loving satisfaction" he expresses over Livingston. "Here I take my stand. I shall ask no further limitation of the liberty of printing than that imposed by the Common Law under the constitution of my state and country. I incline to ask the protection of the *general public* and of youth from having obscenity in any form exposed to their view, or foisted upon them by mail, express, or otherwise, but let the offenses be punished by the states and not the Federal Government—they only having power to punish abuses. This is the Common Law; it is constitutional; it is called for by the cultivated sentiments of mankind; and it is conservative of the morals of youth. If we maintain the residue of our criminal code, let us by no means omit that."

But let us by no means permit the criminal legislature and law of the country to pass into sectarian hands under the belief that the Common Law and its process is obsolete or has "faded from the legal hori-

zon." Liberty and safety are to be found in it now as ever.

VI. The foregoing points dispose of all the Judge's address except his own motive for making it, which is the key to it, and brings up, perhaps, the most important subject of all. For that reveals the conviction which has made such an apology for an unconstitutional law possible from him and others.

It is an appeal to the Liberals to be measured by the moral standards of their conservative opponents, or else it is merely an appeal to their cowardice, which the Judge cannot intend. In either aspect every intelligent Liberal must dissent. "Elder Sniffles" must not be allowed to settle the criterion of morality for Liberals, although his congregation unceasingly cry "How true that is!" Let us see for a moment how the subject stands before them.

Between the retrogrades and the progressives lies "the means," as was pointed out in the Faneuil Hall speech, composed of all "mean" people, and the respectable acquiescent majority with Elder Sniffles as their mouth-piece. They have no conception of a state of mind or morals beyond their own ideal. All different from that, they think below it and act and speak accordingly. The Judge would recognize this readily enough as to everything except "morality," and as to that only he urges Liberals to accept the Elder's standard. Whether they will or not, will be determined not by the cry of the latter's congregation, but by honest attempts to adapt new modes of life to the demands of an ever changing, social environment. In these efforts new suggestions and even new steps forward in morality will be

taken in future as they have in the past, only it is to be hoped with the advantage of some knowledge of social science. Each step will be accompanied with the groans of our Judge and the Elder lamenting the degeneracy of their age. It would indeed be better and safer if they could be limited to groans, but they will occasionally resort to argument and then the danger becomes real. They thereby precipitate the change by making the weakness of the old transparent. The extremes are then too ready to advance and so frighten the conservatives into repressive legislation and violence. So it was in the contest between slave labor and free labor, and now the friends of Mr. Heywood bring on a similar social contest between slave love, with its obscenity, and free love, with purity, as they would describe it. The danger is that the weakness of the arguments of the Judge and Elder will get us into premature social changes. For instance, they both agree thoroughly that Freelove is "unnatural," and yet in the same breath, almost, they joke about its being *a return* to the state of nature of the "man-like ape or ape-like man." This talk about reverting to the man-like ape is not funny in the presence of Herbert Spencer's "Sociology," where every form of sexual relation is found to be "natural" to the human race according to its history and environment. Such arguments about "reversal" have been thrown up by Comte, Spencer, and Fiske, but have no effect on the "Freelovers" who contend that it is simply a "backwardness in coming forward" in those who make it, because they cannot conceive of any social state better than the one that inevitably gives orphanage, widowhood, forced maternity, or celibacy, pros-

titution, private vices unspeakable, marriages often worse than death, and last, and least, "obscenity" itself. The Freelovers show that the natural state of society was the physical and the sexual slavery of woman to man both within the tribe and when captured in war; that all marriage systems, and even forms, are but continuation of this slavery, until finally the Romish Church recently instituted close monogamy, so that one woman is "given away" to one man whom she promises to obey. Now every shade of the "Freelove Reformer," instead of desiring to return to any state of nature of this kind, is striving to emancipate woman from it, and to achieve an independence, culture, purity, protection, and sustenance which shall render such slavery as impossible to women as it has been made to the laborer, who was equally a slave or serf when monogamy was enforced upon woman as the Church took away her liberty and rights under the Roman law.

Such considerations as the foregoing will always convince the greater part of the Liberals that though they cannot agree fully with Mr. Heywood, yet they cannot consistently follow the Judge's advice (singular for a judge!) and sacrifice him, by lynch or mob law, to please his venerable friend "the Elder." They will trust to the common sense of the people, and the law of evolution, to effect needed changes in laws and social life, and to modify the extremists who would precipitate or retard social progress. The Reformers may seem to advocate too rashly the opinion of Hamlet that "There is nothing either good or bad, but thinking makes it so." But this *thinking*, or opinion, is also dependent upon social laws and changes that science is including in

her own domain of order, whereby gradual, and therefore beneficial, growth and progress are secured. In the end, by these means, and not by mob law, purity and the family will be indicated, as Herbert Spencer intimates at the close of his "Sociology."

The real answer to the "Freelovers" is that they have not as yet been able to practically realize their aspirations in such a way as to make them more useful to society than the monogamic marriage. As soon as they do, it will be seen that no form of the sexual relation was ever natural or permanent in the human race, and that to talk of the "emancipated" woman as a return to the old slave victim of the lust of the tribe or of one man is simply ridiculous. The arguments borrowed by the Judge from the Elder on this subject, so easily and idly thrown out, are just such as from their unhistorical character in the past, and their unscientific glance into the future, are in danger of aiding the extreme progressives in bringing upon us the disintegration of our present marriage forms rashly and not for the public good. Such subjects are still much more tender than those of property and government, and should never be entered upon by those who do not recognize that society is indeed a living organism, and that social experiments too closely resemble *vivisection* to be ever rashly undertaken. The true reformer will prepare his path, and know well in every step of progress he takes where his foot can be safely put down before he takes it up. Unfortunately, *fools* will rush in where angels fear to tread; then people, of the state of mind of the Judge and the "Elder," are perfectly convinced that no step must ever be taken at all, and that by statute, or even "mob law," as the Judge intimates, all

change must be forbidden, and no man be allowed to make a fool of himself.

It is quite evident that but for this state of mind the Judge's address, and certainly its closing paragraphs, would never have been written. It is really an apology for the Liberal League addressed to Elder Sniffles' congregation. It yields all the power into their hands in the vain hope that they would not use it to hurt Liberalism. The proper and ex-expected answer to this surrender has been made by the most prominent and intellectual successor of the worthy Elder, the Rev. Joseph Cook, in his Boston Prelude, on this Syracuse Congress. He finds the Judge to be the advocate of "*looseness*," and to all intents and purposes as bad as the "repealers" themselves. Thus will it always happen when the leaders of light and liberty give up their rights and seek approval from the representatives of superstition and bigotry. *Liberals* will probably prefer to stand by their own convictions, and the right to express them under the Constitution.

Nor are they to be held responsible in making such claim, for the convictions of each other, except as they expressly assume them. The proper way is to regard all Liberal people as substantially divided like the French Assembly into the Right, the Center, and the Left. All are members of the large mass of Liberalism, but neither representing nor responsible for the others. On the Right might be placed the editor of *The Index* and his just hatched Liberal League *of America*. On the Left would stand Mr. Heywood with his Freelove conventions. Between the two as the Center, we find the great mass of the Liberals of the country in various organizations, and

both seek the same thing—the most effective suppression of corrupt literature?

4. Is it quite the right thing to assume that men and women unconvicted of crime are abettors of crime because they are not willing to have crime punished by unconstitutional laws?

5. After all, is not the demand for that sort of literature—the supply of which to children and youth all decent people wish to suppress—due chiefly to the parents themselves, who meet the natural curiosity of their children either with evasions, frowns, or *absolute lies?*

6. Grant that there are bad people in the old League—and I indignantly deny that one particle of proof of that has yet been presented—how is the new League to keep them out of its pale, a thing which no church has ever yet succeeded in doing?

7. Why shall we not all come back to the faith that free speech will cure its own evils so far as they can be cured?

8. If the mail-carrier is responsible for the immorality of what he carries, how does he escape that responsibility by either shutting his eyes or allowing the packages to be sealed? If the logic of the Comstock law is at all superior to that of a donkey, why should we not have everything which goes through the mails open to the eyes of a *censor morum?* Why not make clean and thorough work if we undertake it at all? Why allow the detestable criminal to defeat us by a little mucilage and a higher-priced stamp? Are the friends of virtue determined to make practical fools of themselves?

A FRIEND OF BOTH LEAGUES.

EXTRACTS FROM THE CONSTITUTION

OF

HE NATIONAL DEFENSE ASSOCIATION.

ARTICLE II.—The objects of this Association are;

To investigate all questionable cases of prosecution under what are known as the Comstock Laws, State or National; and to extend sympathy, moral support and material aid to those who may be unjustly assailed by the enemies of free speech and a free press.

To rescue those who may be convicted and imprisoned for no other crime than exercising the natural right to think their thoughts and express them orally or in print.

To defend honest investigators in all departments of science, and to uphold the right of the people to acquire a useful knowledge of human physiology.

Finally to employ all peaceful and honorable means to roll back the waves of intolerance, bigotry, and ignorance, which threaten to submerge our cherished liberties.

ARTICLE III.—Any friend of these purposes may become an active member of this Association by the payment into its Treasury of the sum of Ten Dollars ($10.00), and the payment of One Dollar ($1.00) shall entitle the donor to a certificate of honorary membership for the period of one year, and to a report from the officers of this Association of its receipts, disbursements and transactions.

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